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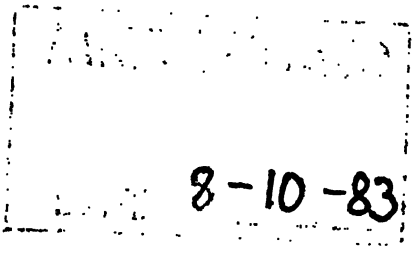
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A

TREATISE

ON THE

LAW OF FIRE INSURANCE,

AND

INSURANCE ON INLAND WATERS.

IN TWO PARTS.

WITH

AN APPENDIX OF FORMS.

BY ELISHA HAMMOND, Esq.

COUNSELLOR AT LAW.

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CONTENTS.

PART I.

OF FIRE INSURANCE.

CHAPTER I.

Page.

1. General Nature of a Policy of Insurance, ... 1
2. A clear right of action should be contained, ... 3
3. Parties interested to be inserted in it, ... 7
4. Indorsements and Conditions of the policy, ... 9

CHAPTER II.

OF THE PROPERTY AND INTEREST OF THE INSURED, 18

1. The amount or quantity of Interest, ... 19
2. The different sorts of Insurable Interest, ... 21

(*a*) The interest of Mortgagor and Mortgagee; or, the legal and equitable interest of the insured, ... 21

(*b*) The interest of Consignees, Factors and Commission Merchants, 23

(*c*) The interest of Carriers, ... 29

(*d*) The interest of an Indorsee of a Bill of Lading, . . . 30

(*e*) Of Joint and Several Interests in the same policy, . . . 32

CHAPTER III.

THE NATURE AND EXTENT OF THE RISK FOR WHICH THE INSURER UNDERTAKES, ... 35

1. What risks are in general within the policy;—and herein of Barratry, Negligence, &c. 35
2. Damage by heat in the process of manufacture without ignition, 42
3. Insurance of Specific Articles to be construed by the general scope of the policy, ... 44
4. Commencement and Duration of the risk, ... 46
5. Effect of Notice by an office to determine a contract except upon payment of a higher premium; and of the time allowed for the payment of premiums, ... 48
6. A nominal misdescription and the necessary introduction of fire into a building, covered by the common policy, ... 49

CHAPTER IV.

Page.
OF INSURANCE AGENTS, ... 51
1. Of the Agents for the Office, ... 51
2. Of the Agent for the Assured, ... 55

CHAPTER V.

OF THE FORM AND REQUISITES OF A POLICY, . . 59
1. Contract, when consummated, ... 59
2. Description of the Parties, ... 62
3. Description of the Property or Subject of Insurance, . . 66
4. General Construction, ... 72
5. Construction of Particular Clauses, ... 72
(*a*) "Usurped Power," 73
(*b*) "Civil Commotion," 74
6. Parol Evidence to explain, ... 75
7. Renewal of Policy, ... 81

CHAPTER VI.

WARRANTY AND CONDITIONS, ... 82

CHAPTER VII.

MISREPRESENTATION AND CONCEALMENT, . . . 89
1. Misrepresentation of Material Facts, ... 89
2. Concealment of Material Facts, ... 93

CHAPTER VIII.

OF LOSSES, ... 97
1. Of Total Loss, ... 98
2. Of Partial Loss and Adjustment, ... 98
3. Of Notice of Loss, ... 99
4. Of Loss in Open and Valued Policies, ... 100
5. Of Payment of Loss, ... 104

CHAPTER IX.

OF THE PROCEEDINGS ON POLICIES, ... 105
1. Of Preliminary Proof, ... 105
2. Of the Jurisdiction of Courts of Common Law, . . . 111
3. Of Arbitration, ... 112

Page.
3. Of the Declaration, ... 113
4. Pleas to a Declaration upon a Policy *under seal*, . . . 115
5. Pleas to a Declaration upon a Policy *not under seal*, . . 116
6. Evidence upon the Trial, ... 117

CHAPTER X.

OF ASSIGNMENT OF POLICIES, ... 125
1. Of Assignment in General, ... 125
2. Of Assignment after the fire, ... 127
3. Of Suit by Assignee, ... 127

CHAPTER XI.

OF PROCEEDINGS IN EQUITY, ... 128
1. Equity Jurisdiction, ... 128
2. Equities attaching upon policies, ... 129
(*a*) In general, no equity between Landlord and Tenant, . . 129
(*b*) Proceeds of Policies in General payable to the Executor, &c., 131
(*c*) But when affected with a Trust they may be payable to heir or devisee, ... 131, 2
(*d*) Equitable Subrogation or Substitution. 133

CHAPTER XII.

OF DOUBLE AND RE-INSURANCE, ... 135

CHAPTER XIII.

OF THE RECOVERY BACK OF LOSSES IMPROPERLY PAID, 138
Of Massachusetts Statutory Provisions in regard to the recovery of losses against Insurance Companies, ... 138

PART II.

OF INSURANCE UPON INLAND WATERS, ... 139
1. Of the Persons Insured, ... 139
2. Of the Property Insured, ... 140
3. Of the Voyage or Trade insured, ... 141
4. Of the Form of the Policy, ... 143
5. Of the Perils or Risks, ... 144
6. Of Warranties. 147
7. Of Misrepresentations and Concealment, ... 147

Page.

8. Of Loss, ... 148
Of Total Loss, ... 148
Of Partial Loss, ... 149
9. Of Average and Abandonment, ... 149
(*a*) Of Average, ... 149
Of Abandonment, ... 151
Of Consequences of Abandonment, ... 154
Of Abandonment, test of, ... 154
10. Of Proceedings on Policies, ... 154

ADDENDA, ... 161

APPENDIX OF FORMS, ... 169

1. Forms on Marine Policies, ... 169
2. Forms of Policies against Fire, ... 171, *et seq.*

TABLE

OF

CASES CITED.

A

PAGE.

Adams v. The Penn. Ins. Co., 18
Ætna F. Ins. Co. v. Tyler, 15
Airy v. Bland, 57
Alchorne v. Saville & others, 3
American Ins. Co. v. Durham, 40, 146
American Ins. Co. v. Griswold, 142
Andrew v. Ellison, 5
Andrews v. Palsgrave, 120
Astor v. The Union Ins. Co., 76
Austen v. Drew, 43

B

Baker v. Ludlow, 11, 87
Barker v. Marine Ins. Co., 7
Barker v. Brace, 76
——— v Phœnix Ins. Co., 106, 111
Bates v. Graham, 78
Bartlett v. Goodwin, 29
——— v. Walter, 67
Bates v. Graham, 78
Bean v. Stupart, 83, 86
Beel v. Keely, 119
Beel *et at* v. Mason, 48
Bell v. Ansley, 33, 113
——— v. Humphreys, 34
Berthon v. Loughman, 79 80
Bilbie v. Lumley, 138
Bishop v. Brentland, 39, 144
Bize v. Fletcher, 82
Blackett v. The Royal Ex. Assu., Co. 78
Boyd v. Duboies, 44
Bricta v. N. Y. Laf. Ins. Co., 29, 127, 140

PAGE.

Brocklebank v. Sugrue, 53, 117
Brooks v. The Lay. Ins. Co., 98
Brooks v. The Oriental Ins. Co., 149
Brown v. The Union Ins. Co., 40
——— v. Quilter, 129
Bryant v. Com. Ins. Co., 78
Buck & Hedrick v. The Chesapeake Ins. Co., 29
Bufe v. Turner, 95
Buffington v. The N. Y. Laf. Ins. Co., 127
Bush v. The Royal Ex. Ass. Co., 38 144

C

Campbell v. Rickards, 80
Carroll v. Boston M. Ins. Co., 126, 141
Carton v. Boehm, 79, 95, 122
Case v. Davidson, 154
Catlett v. Pacific Ins. Co., 33, 63, 79
Catlin v. The Springfield F. Ins. Co., 40, 106
Clifford v. Hunter, 144
Chandler v. Belden, 198
Chaurand v. Angustein, 124
Chapman v. Walton, 79
Clark v. The Inhab. of The Hundred of Blythe, 75, 133
Clay v. Harrison, 118
——— v. The Ocean Ins. Co., 66
Cohen v. Hanman, 71, 113
Cochrane v. Fisher, 83
Coit v. The Commercial Ins. Co., 66 73, 76

PAGE.

Columbian Ins. v. Lawrence, 22, 38, 71, 110
Coolidge v. The Gloucester M. Ins. Co., 152
Copeland v. Mercantile Ins. Co., 139
Corbett v. Gordon, 56
Cornell v. Le Roy, 14, 89
Coster v. Phœnix Ins. Co., 72
Crawford v. Hunter, 27
Crousillat v. Ball, 119
Crowley v. Cohen, 143

D

Daryell v. Bederly, 80, 122, 123
Dalzell v. Mair, 57
Davis v. Boardman, 143
Davis v. Geldart, 15
Dawes v. The North River Ins. Company, 110
De Forest v. The Fulton F. Ins. Co., 7, 23, 29, 64, 77, 101, 122
Delonguemare v. The Tradesmen's Ins. Co., 12, 41, 60, 68, 70, 84, 90
Dickey v. Amer. Ins. Co., 148, 153
Dickson v. Lodge, 119
Dixon v. Hammond, 57
Dixon v. Yeates, 30
Dobson v. Southby, 44, 49
Doe d'Pitt v. Laing, 50, 88
Doe d'Pitt v. Shewen, 47, 50
Donatle v. Ins. Co. of North Amer. 199
Dow v. Hope Ins. Co., 155
Dow v. Whiton, 79, 86
——— v. Whetten, 127, 147
Drinkwater v. The London Ass. Co., 73
Duncan v. The Sun. F. Ins. Co., 12, 89, 66
Dunham v. Amer. Ins. Co., 146

PAGE.

E

Eager v. Atlas Ins. Co., 76, 77, 78
Edger v. Bumstead, 58
Ellery v. The New England Ins. Co., 143
Elsee v. Gatward, 56
Ewer v. Washington Ins. Co., 79
Ex parte Houghton, 21

F

Farmers' In. & Loan Co. v. Snyder, 89
Fisher v. Willard, 117
Fitcherbert v. Mather, 10
Flint v. Flemyng, 147
Folkes v. Chadd, 124
Foster v. The United States Ins. Co., 33, 64, 79
Fowler v. Ætna Ins. Co., 66, 73, 83, 89
Frances v. Ocean Ins. Co., 107
The Frances, 119
French v. The Hope Ins. Co., 66
Friendlander v. The London Ass. Co., 72
Frith v. Barker, 77

G

Gabay v. Lloyd, 78
Gazzam v. Cincinnati Ins. Co. 149
Glaser v. Cowie, 56
Godsall v. Bolders, 133
Goodsall v. Baldwin, 136
Gordon v. Little, 77
——— v. Mass. F. & M. Ins. Co., 126, 153
——— v. Remington, 97
Gracie v. New York Ins. Co., 133
Grant v. Parkinson, 141
Graves *et al* v. Boston M. Ins. Co., 8, 64

PAGE.

Grim v. Phœnix Ins. Co., 38
Griswold v. American Ins. Co., 142
Guerlain v. The Columbian Ins. Co., 98
Guthrie v. Armstrong, 53, 118

H

Hadden v. Parry, 119
Haff v. The Eagle F. Ins. Co., 101, 106
——— v. Mar. Ins. Co., 106
Hahn v. Corbett, 35
Haines v. Busk, 56
Halsey v. Brown, 77
Hedrick v. The Chesapeake Ins. Co., 28
Hammond v. The Essex Ins. Co., 154
Harding v. Carter, 57
Harris v. The Eagle F. Ins. Co., 101
Hart v. The Delaware Ins. Co., 18
Havens v. Gray, 155
Haughton v. Ewbank, 83
Herbert v. Champion, 53
Hibbert v. Pigou, 82
Higginson v. Dall, 79, 80, 84, 88; 152
Holbrook v. Brown, 33
Holtzapfell v. Baker, 129
Homer v. Dorr, 77
Horsely v. Rushstone, 53
Howell v. Cincinnati Ins. Co., 146
Hulse v. Young, 27

I

Inman v. Western Fire Ins. Co., 14
Irving v. Richardson, 100

J

Jameson v. Swainston, 58
Jefferson Ins. Co. v. Cotheal, 8, 65, 123, 140
Jell v. Pratt, 57
Johnson v. Mason, 117
Johnson v. Ward, 53, 119
Jordan v. James, 31
Joselyn v. Ames, 63

K

Kaines v. Knight, 78
Kenyon v. Berthon, 83
Kensington, v. Inglis, 12, 87

L

Lane v. Mutual F. Ins. Co., 126
Langdon v. N. Y. Equitable F. Ins. Co., 10, 12
Langdale v. Mason, 73
Laurent v. The Chatham F. Ins. Co., 20, 101
Lawrence v. Ocean Ins. Co., 99, 111
Lawrence v. Sebor, 34, 79
——— v. Van Horne, *et al* 63, 64, 65
Lazarus v. The Commonwealth Ins. Co., 22
Leadbetter v. Farrow, 53
Leadbetter v. Ins. Co., 110
Le Crass v. Hughes, 104
Lee v. Boardman, 98, 148
——— v. Mass. M. & F. Ins. Co., 80
Leslie v. De la Torre, 79
Levi v. Baillie, *et. al.* 16
Levy v. Merrell, 59
Lewis v. Thatcher, 80
Locke v. North Amer. Ins. Co., 22, 126
Lowrieu v. Bordieu, 49
Lucas v. The Jefferson Ins. Co., 136, 137
Lucena v. Crauford, 21
Luciani v. Amer. F. Ins. Co., 81
Luckley v. Furse, 12
Ludlow v. Bowne, 118
Lynch v. Daryell, 2, 125, 125
——— v. Dunston, 95

PAGE.

M

McCullock v. Eagle F. Ins. Co., 22, 60
McGivney v. Phœnix Ins. Co., 22
Mactier v. Frith, 60
Macmoran v. New Castle F. Ins. Co., 90
Magrath v. Church, 150
Mapes v. Coffin, 134
Marsh v. Robinson, 112
Martin v. Salem M. Ins. Co., 40
Martin v. Sitwill, 71
Maryland Ins. Co. v. Ruden, 119
Mason v. Joseph, 54, 118
Mason v. Sainsbury, 134
Mead v. Davison, 59
Measer v. Smith, 121
The Merimact, 120
Mellish v. Allnutt, 120
Millaudon v. Atlantic Ins. Co., 34
Moody v. Jones, 44
Moadinger v. Mech. F. Ins. Co. of the city of N. Y., 45, 73
Motteux v. London Ass. Co., 112
Mumford v. Hallett, 3
Munson v. The New England Ins. Co., 154
Murray v. The Columbia Ins. Co., 33, 79

N

Neal v. Irving, 53, 117
Newby v. Read, 15
Newton v. Thornton, 118
N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co., 94, 137, 144
N. Y. Equitable Ins. Co. v. Langdon, 87, 88
N. Y. F. Ins. Co. v. Walden, 96, 148
N. Y. Gas Light Co. v. The Mech. F. Ins. Co., 79
Nelson v. Dubois, 63
New Castle F. Ins. Co. v. Macmoran, 82

PAGE.

Newby v. Read, 15
Nichols v. The Maine F. & M. Ins. Co., 148
Noble v. Adams, 125
——— v. Kennoway, 75
Norton v. R. & S. Ins. Co., 99

O

Ocean Ins. Co. v. Carrington, 47
Odiorne v. Maxcy, 117
Oldman v. Bewicke, 109
Oliver v. Green, 29, 67

P

Pacific Ins. Co. v. Catlett, 65
Parker v. Patrick, 120
Parkinson v. Collier, 77
Parks v. General Int. Assu. Co., 60, 79
Pattison v. Mills, 143
Patrick v. Eames, 147
Pawson v. Barnevelt, 82
——— v. Watson, 91
Peele v. Merch. Ins. Co., 148, 152
Perkins v. Washington Ins. Co., 51, 118
Perry v. Ohio Ins. Co., 149
Peele v. Suffolk Ins. Co., 153
Petapsco Ins. Co. v. Coulter, 39
Potter v. The Suffolk Ins. Co., 73
Peyton v. Hallett, 119

R

Rankin v. American Ins. Co., 76, 77
Rawson v. Barnevelt, 87
Rayner v. Goodmand, 151
Rhind v. Wilkinson, 127
Rickards v. Murdock, 79, 123, 124
Rickman v. Carstairs, 100
Roberts v. Ogilvy, 34
——— v. Fonereaux, 10, 14
Rogers v. Davis, 15
——— v. Salvador, 153

PAGE.

Rogers, v. The Traders' Ins. Co., 139
Roumage v. The Mechanics' F. Ins. Co., 107
Routledge v. Burrell, 64, 109
Rowley v. Bigelow, 120
Ruan v. Gardner, 67
Ruckster v. Palsgrave, 120
Russell v. Bangley, 57
——— v. The New England M. Ins. Co., 64, 121

S

Sadlers' Company v. Badcock, 18, 124, 125, 126
Salvin v. Jones, 48
Saunders' Com. v. Badcock, *et al.* 2
Scott v. Irving, 78
Seaman v. Fonnereau, 95
Seller v. Work, 56
Shaw v. Robberds, 95
Shaw v. Low, 146
Shaw v. Robbunds, 14, 95
Small v. Moate, 30
Smith v. Delaware Ins. Co., 40
Smith v. Lascellas, 56
——— v. Wright, 75, 77
Snowden v. Warder, 77
Snyder v. Farmers' Ins. Co., 147
Snyder v. Farmer's Loan Co., 86, 147
Somes v. Brewer, 120
Stebbins v. The Globe Ins. Co., 62, 78
Strong v. Manuf. Ins. Co., 22
Stubb v. Lund, 31
Suckley v. Delafield, 40, 146

T

Talcott v. Mar. Ins. Co., 106
Thayer v. Middlesex Mut. F. Ins. Co., 46, 48
Thomas v. Bishop, 53
Thompson v. Charnock, 112
——— v. Ketcham, 79
Thornton v. R. E. Assurance Co., 124
Thurtell v Beaumont, 40
Todd v. Reid,
Tonge v. Watts, 18
Toppan v. Atkinson, 71
Traders' Ins. Co. v. Roberts, 22
Turner v. Burrows, 34, 63, 65
Tyler v. Ætna F. Ins. Co., 22, 33, 67, 84, 96, 148

W

Wadsworth v. Pacific Ins. Co., 98, 149
Walker v. Maitland, 39
Wallace v. Ins. Co., 100, 144
Wallace v. Tellfair, 55
——— v. Tellford, 56
Warwick v. Slade, 57
Watchorne v. Langford, 45
Waters v The Louisville In. Co., 36, 39
Webb v. Protection Ins. Co., 143
Webster v. De Tastet, 56
Wells v. Archer, 126
Welles v. The Boston Ins. Co., 99, 150
Welles v. Hopwood, 151
Whitney v The N Y F. Ins. Co., 155
Whitteridge v. Norris, 150
Wilcox v. The Union Ins. Co., 40
Wilkinson v. Coverdale, 55
Williams v. Coverdale, 56
Williamson v. Innes, 147
Wilson v. Hanson, 80
Winn v. The Columbian Ins. Co., 154
Wolcott v. The Eagle Co., 99, 100
Wood v. The Lin. & Ken. Ins. Co., 142, 148
Wood v. Masterman, 15
Wood v. Worsley, 107
Worsley v. Wood, 84
Wright v. Welbie, 121

THE

LAW OF FIRE INSURANCE.

CHAPTER I.

OF THE NATURE OF THE CONTRACT.

1. *General nature of a Policy of Insurance.*
2. *A clear right of action should be contained in it.*
3. *Parties interested to be inserted in it.*
4. *Indorsements and conditions of the Policy.*

1. This contract is in the nature of an indemnity given by the insurers against such loss or damage by fire as may happen to the insured in respect of the houses, buildings, stock, merchandise, or other articles covered by the policy.

The insurers, after reciting the receipts of the premium, usually *covenant* and *agree*, or *undertake*, that from the day named in the policy unto and inclusive of another day named in the policy, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the insurers accept the same, the stock and funds of the (company) shall be liable to make good any such loss or damage as shall happen by fire, (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion, or riot, or any military or usurped power,) to the property specified.

Insurance being a contract of indemnity, must be founded on the existence of some property or interest, which is liable to be damaged or affected by the perils against which the insurance is made. Insurance does not cover a loss which is necessarily incident to the nature of the thing insured rather than occasioned by an adventitious cause, such as a loss by worms, or rats eating holes in the keel, or other parts of the vessel; or if goods are put on board the

ship in a very damaged state, in consequence of which they are liable to ignite and generate a fire, by which they are consumed, the underwriters are not liable for the loss. The underwriters are not discharged by the circumstance of the goods having been damaged ; but if in consequence of the damage which the goods have previously received, they consume themselves, the underwriters are not liable.

In the two leading cases *Lynch and another* v. *Daryell and another*, 3 Bro. P. Ca. 497, *and the Sadlers' Com.* v. *Badcock and others*, 2 Atk. 554, it is held, that policies against fire are not insurances of the specific things mentioned to be insured, and which attach to the reality or pass with the same as incident thereto by assignment, but they are special agreements with the persons insured, against such loss or damage as they may sustain by the destruction or partial damage of the thing upon which the insurance is predicated ; and it follows, that the party for whom the insurance is made must have an interest in the premises at the time of the insurance, and at the time of the loss, or he can sustain no loss against which the contract will entitle him to indemnity ; but it does not follow as a consequence of that attribute of the contract that the policy must be a valued policy ; or, in other words, that the sum in which the owner is insured is the sum which he will, in case of a total loss, be entitled to recover. The reverse would be the more natural inference, that the recovery of the assured must be regulated by the value of the property ; for if the policy be a personal agreement to indemnify him against loss or damage, his claim will be satisfied by the reimbursement to him of the actual value of the property at the time, which is the true amount of his loss by the peril, and such is the doctrine of those cases. In both of them the policy is held to be a contract to make good the loss which the contracting party himself should sustain ; but no intimation is given of the right of the assured to the specific sum mentioned in the policy in the case of a total loss, as liquidated damages, or an agreed indemnity. On the contrary, that sum is treated as the extent of the insurers liability, and not as the measure of the assured's claim.

The contract is to pay the amount of the actual loss or damage, but with the restriction of the amount of the payment to the sum mentioned in the policy. By Jones, C. J. in 1 Hall, 41.

And assuming that the principle of valuation may, by the mutual agreement of the parties, be applied to an insurance against loss or damage to property by fire, still the policy must be specially adapted to the case, and must express on the face of it the assent of the parties to the valuation agreed upon between them. ib.

The marine policy also is a personal contract, and when made on the assured's own account, the terms of it are that the assured causes himself to be insured, and makes insurance in a given sum, for a specific voyage, or term of time upon the ship or the goods on board of her, against the perils of the sea and other enumerated risks. The marine policy in this form thus clearly resembling that of the fire policy in the usual form, is always understood, and held to be an open policy, and to entitle the insured in case of loss, whether

total or partial, to an indemnity and recompense to the amount of his actual loss by the perils from which the contract professes to protect him. There may be insurable interests, such as profits in the case of *Mumford* v. *Hallet*, 1 J. R. 433, for example, which must of necessity be regarded as valued at the amount insured upon them. And in such cases the policy must be considered a valued, and not an open policy; but these are exceptions to the rule. By Jones, C. J. 1 Hall 47, 8.

Though the policy is a contract of indemnity, yet the extent and value of the recovery will not vary with the special and peculiar circumstances of the insured, and local advantages or disadvantages of the building, and the uses to which it is applied:—these incidental and collateral circumstances are not to enter into the estimate of value under the contract of insurance. ib. It is the tenement upon which the insurance is made; and the actual value of it as a building, is the loss of the insured in cases of its destruction by fire. To that measure of indemnity the proprietor is entitled, however unproductive the property may be, and he is entitled to no more, whatever revenue he may have derived from the tenement. ib. The intrinsic value of the property itself at the time of its destruction, is the rule by which the indemnity is to be measured, without regard to any special or adventitious circumstances which may enhance or diminish the relative value or importance of it to the insured. "It is the true and actual value of the tenement itself at the time, independently of its location, or the insecurity of the title, or terms by which it is held that the insurers agree to make good to the present proprietor in case the loss or damage by fire happens during the continuance of his ownership, and within the term of the insurance. It is of no importance whether the tenement stands upon freehold, or upon leasehold ground, or whether the lease is about expiring, or has the full time to run when the fire occurs, or whether it is renewable or not. The condition of the policy is satisfied if the title and ownership are in the insured at the time of the insurance, and at the time of the loss, and the measure of his indemnity is the amount of his interest in the tenement when destroyed by the fire, notwithstanding that the whole interest would have expired the very next day, or soon after the loss occurred." ib.

2. A *clear right of action* should exist against the parties subscribing or executing the policy, to the extent of the funds of the society; that right should not be confined to a mere *order* for payment to be made by the subscribing directors upon the general body of the directors or the company, for an action in such a case will not be maintainable against the parties *executing*, or the directors generally.

In *Alchorne* v. *Saville and others*, 6 Moore 200, n. the V. Chancellor requested the opinion of the Court of K. B. upon the question whether an action would lie under the following circumstances:—On the 20th of May, 1811, the plaintiffs insured a certain house and premises in which they were interested in the Hand Insurance Office. The policy was made and duly executed by T. F. N. W. and J. M. as three of the trustees and directors of the office, whereby, in consideration of the sum of 4*l.* 10*s.* the premises valued at 800*l.* were in-

sured for the term of one year from the date thereof. The policy, after reciting that the plaintiffs had paid into the treasury of the amicable contribution or society, commonly called the Hand in Hand Contributionship or Society, for the insuring of houses and goods from loss or damage by fire, the sum above mentioned, for the purpose above mentioned, proceeded to declare as follows: "Now we, the trustees and directors of the said society whose names are hereunto subscribed, *do order, direct, and appoint* the directors for the time being of the society to raise and pay by and out of the monies, securities and effects of the said contributionship, pursuant and according to certain deeds and settlements," &c. The instrument, after declaring that the order thus mentioned should comprehend either a total or partial loss by fire, proceeded as follows:—"provided and it is hereby declared and agreed, that when any assignment shall be made of this policy, such assignment shall be entered in the office book within ninety days from the date thereof, &c., and also, that if, at the expiration of one year from the date thereof, the said plaintiffs shall again pay the sum of 4*l.* 10*s.* then all the conditions and *agreements* of this policy shall remain in full force for the further term of one year, and so shall be continued from year to year as often as the said sum of 4*l.* 10*s.* shall be paid by the plaintiffs, and the directors for the time being shall agree thereto by accepting or receiving the same. In witness," &c. The policy was signed by J. F. N. W. and J. M. three of the trustees and directors of the said office, and sealed and delivered, duly stamped and attested.

The plaintiffs having sustained a loss by fire, and the defendants having refused to pay within the time prescribed by the policy, a bill was filed in Chancery against the latter as acting trustees and directors of the office, praying that the court would decree the payment of the loss which the plaintiffs had sustained, and the above case was sent for the opinion of the Court of Kings Bench.

Lord C. J. Abbott.—"I can find nothing in this policy by which the defendants *covenanted* to pay the loss which the plaintiffs have sustained. The deed only imports that the trustees and directors for the time being who execute it, *do hereby order, direct and appoint* the trustees and directors for the time being to pay the loss, in case it should happen, out of the funds belonging to the society. It does not appear to me that the latter words in the policy can have the effect of making that an agreement, which upon the face of it appears to be only an *order for the payment of money.* It never could be intended that this instrument so prepared should have the effect of making the trustees and directors for the time being personally liable; nothing could be more difficult than for a company of this description to find acting trustees who would personally pay all the policies which the company might think fit to execute. It therefore appears to me that the only remedy that the plaintiffs have is in equity, and that they cannot turn round and treat this as a covenant at law. I admit that where a party executes an instrument and thereby says, "I agree to do so and so," he would be liable to an action of covenant, but how could a declaration in covenant be framed in this case, either against the defendants or

the parties who have executed the policy? As against the latter, no such declaration could be drawn, because the policy imports nothing but an order upon other persons to pay the loss in case it should happen; and, as against the former, supposing the instrument to have the effect of an agreement, the action would not lie, because it does not appear that they have executed it. The policy imports nothing but an *order*; and *not an agreement*; I am therefore of opinion that an action of covenant cannot be maintained." The rest of the Court were of the same opinion.

That case was cited as an authority in *Andrews* v. *Ellison*, 6 Moore, 199, which was covenant on a policy, executed by the defendants under seal, to indemnify the plaintiffs against a loss by fire. The declaration stated, that the defendants, on the 9th Dec. 1819, as three of the directors of the National Union Fire Association, made a certain deed-poll, commonly called a policy of insurance, whereby, after reciting that the defendants, as such directors had admitted the plaintiff to be a member upon the terms, covenants and conditions prescribed by the deed of settlement of the said association; and that the plaintiff had consented to become a member accordingly, and had subscribed the sum of 6*s*. being the consideration money for one years insurance from the 25th December, 1819, and that so long as he should continue to pay the same sum annually on that day, he should be entitled to a remuneration out of the society's funds in case of loss by fire to all or any of the property therein after mentioned; not exceeding for each item respectively the sum set against the same, viz: 200*l* on his household furniture, &c. in his then brick dwelling house; it was *declared*, that in case of loss by fire happening to any of the above mentioned property while such subscription should be regularly deposited, the society was to pay according to the deed of settlement to the plaintiff all such loss and damage, not exceeding the sum set against each article respectively, as he might sustain thereto by fire; and it was further *stipulated* and thereby *declared*, that neither of them, the said directors who subscribed the said deed-poll or policy of assurance, nor the plaintiff, as the holder of the policy, should, as members of the said society, be subject or liable to any demand for any loss or losses, except under the articles establishing the said society as was provided by the same. The declaration then set out certain articles referred to in the policy, and subject to which it was effected, and concluded by the usual averments. Several special pleas were pleaded, and on these pleas issues were joined. The jury found under the direction of C. J. Dallas a general verdict for the plaintiff.

Upon a rule to arrest the judgment, on the ground that there was nothing *on the face of the policy*, or *in the declaration, to import any covenant or agreement in law* to support the action, or render the defendant liable to pay the loss in question. But the Court refused to arrest the judgment and discharged the rule. Ld. C. J. Dallas said:—"although there are no precise words in that instrument, still the defendants have *stipulated* and *declared* that neither of them as directors of the association, or as members of the society, should be subject or liable to any demand for loss or losses, except under the articles for es-

tablishing the society, and as is provided by the same. In the reasonable construction of this stipulation it amounts to an express agreement, and the instrument may be considered as a covenant to entitle the insurer, in case of loss by fire, to receive a remuneration out of the funds of the society to the extent of such funds, as the defendants have expressly declared that the society would be responsible, but they have limited such responsibility to the sufficiency of their funds. The plain and obvious meaning, therefore, appears to me to be, that the association are liable to the extent of their funds; and consequently that the defendants, as three of the directors, have entered into an express agreement to be responsible to the plaintiff as far as the funds of the society will allow. The case is altogether distinguishable from the case of *Alchorne* v. *Saville* (*supra*), as here the defendants *have executed the deed*, but there they were not parties to it, they only ordered the directors of the society for the time being to do particular things, viz. to raise and pay out of the monies and securities of the contributionship according to certain deeds and settlements, and the Court of K. B. decided that they were not personally liable, as it was not their deed, and as they merely appointed other persons to pay a loss, in case it should happen, out of the funds belonging to the society. Here, however, the defendants covenanted to pay, if the funds of the society should be adequate. That, therefore, puts an end to the question. Besides, the breach assigned by the plaintiff in his declaration is sufficient, for he states that, although the funds of the society were adequate to pay, yet the defendants refused to do so."

Mr. Justice Richardson.—"The defendants should either have demurred, or pleaded that the funds were insufficient; but they have put a number of other pleas upon the record, imputing fraud to the plaintiff, which the jury negatived, and set him right by their verdict; and the defendants now seek to turn him round on an objection to the declaration; but I think it is not well founded, or at all events it is insufficient for arresting the judgment. It appears on the face of the policy that the defendants were three of the directors; that as such they admitted the plaintiff to be a member; and it then states that he should be entitled to a remuneration out of the society's funds in case he sustained a loss by fire, and that the society had funds, and were bound to pay according to the terms of the articles under which it was established. The policy also contains a declaration that the society were to pay according to the deed of settlement, and that the defendants, as directors, should not be subject to any demand for losses, except under the articles establishing the society. Under this stipulation the plaintiff was entitled to set out such articles in his declaration, and which are now properly brought before the Court. The eighth article held out that the society were liable to satisfy such loss, in case the insurer did all that was requisite of him to be done within that period. This case is wholly distinguishable from that of *Alchorne* v. *Saville* as here the substance of the policy is set out, and the deed of settlement refered to. In that case there was no sufficient words to raise a covenant by the defendants, as they merely appointed the directors for the time being to pay out of the mon-

ies, securities, and effects of the contributionship pursuant and according to certain deeds and settlements; and the Court thought that the policy imported an order for the payment of the money, and not an agreement, and that even if it could be considered as such, and was declared upon as against the defendants, the plaintiff must have been nonsuited on the plea of *non est factum*, because it was not their deed."

Some cautious pleaders, (observes Mr. Ellis, p. 10,) in framing declarations in behalf of the insured to recover upon a loss, aver that the share of the capital in the company belonging to the subscribing directors, amounts to some large sum of money more than sufficient to cover the sum insured for, with the object of affecting the subscribing directors personally, in case, by means of any defect in the internal machinery of the company, or any other cause, the joint stock funds of the company should not be made available to the purpose.

In England, by stat. 14 Geo. 3. c. 148, s. 2, it is enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other *event* or *events*; without inserting in such policy or policies the person or persons, name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

3. *Parties interested to be inserted in the Policy.*

A policy against loss by fire differs from a marine policy only in the usual forms of the two classes of policies; the latter is most commonly general in its terms, comprehending in its indemnity all who are interested in the subject of insurance; while the former limits its protection to those who are specially named in it. Both are personal contracts and contracts of indemnity to the assured solely. It is the difference in the terms of the different contracts, that creates the difference in the nature and extent of the insurance. The companies who insure against fire, usually, require the names of the assured, to be inserted in the policies, and restrict the insurance to the persons so named, and stipulate against a transfer of the policy without the consent of the insurers. So may the insurers against maratime risks: and upon such restricted policies the interest must be averred and shown to be in the persons insured in the policy, as strictly as in a policy against loss by fire. By Jones, C. J. in *De Forest* v. *The Fulton Fire Ins. Co.* 1 Hall, 111, 112. In the case of *Barker* v. *Marine Ins. Co.*, 2 Mason, 369, an insurance was effected on goods which had been abandoned to the insurers and accepted by them, but the goods had been purchased in by the master himself, for the original owners, at a sale of them in the port of necessity, and the policy was for account of the master, the original owner, or both of them: the sale to the master being held to confer no title upon him, the policy was adjudged to be inoperative, because the property, being vested in the insurers by the abandonment and the acceptance of it, prior to the insurance, the persons named in the policy had no insurable interest, upon which it could attach. So in the case

of *Graves et al.* v. *The Boston Marine Ins. Co.* 2 Cranch, 419, a policy on a cargo in which the two plaintiffs were jointly interested, was held to cover the interest of Graves only, and not to cover that of his co-partner, because the name of Graves alone was inserted in the policy, and the insurance was in its terms for him only.

It is not necessary that the party assured should have the precise interest he intends to insure inserted in the policy. 11 Johns. R. 311. In *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72, two were named in the policy, and the words also *or whom it may concern* were added. The persons named in the policy sued according to an express stipulation in the policy, and it was decided that the whole sum might be recovered, although it appeared that one half of the building belonged to a third person. By becoming parties to such a contract, the insurers were estopped from objecting to the want of notice of the names of the assured.

If a policy is *on account of the owners*, the owners only can sue; but if it is for *whom it may concern*, any one having an insurable interest may bring an action, provided it appear that the policy was effected for the party claiming the right to sustain the action. 4 Wend. 75. And where A. B. on account of ——— causes insurance, then any person holding the policy may prove that he was the person intended to be insured and fill the blank accordingly. 5 ib. 541. "For account of whom it may concern" is the form adopted when the interest is doubtful; but when the individual is named in the policy, it is then understood that the property insured belongs to him. 3 J. Cas. 134.

Mr. Chief Justice Jones observes (1 Hall, 112, 113), that he knows "of no principle or adjudged case, which prescribes a narrower rule of insurable interest of a policy against fire, than for a policy against the perils of the sea. The subject of insurance may be such as not to admit of any other insurable interest, than the beneficial ownership; whatever interest the assured might insure against maratime risks, he may insure against fire. And, indeed, the marine policies usually, if not universally, comprehend an indemnity against loss or damage by fire, during the voyage or term for which the insurance is effected; and the only difference between a Marine policy, which enumerates loss by fire as one of the risks insured against, and a fire policy insuring against loss or damage by fire, is that the one protects the property from loss by fire on board of a ship, and the other from fire in a warehouse. The policy in each case, in its principle, without any special agreement engrafted upon it, is a contract of indemnity, and the assured must show an insurable interest, and a loss to himself, to entitle him to recover."

A policy of insurance is not an insurance of the specific thing mentioned to be insured, and does not attach on the reality, or go with the same, as incident thereto, but is a special agreement with the person insured, against such loss or damage as he may sustain, and the party insured must have a property at the time of the loss, or he can sustain no loss. Policies against the risk of fire, do not materially vary from the principles of a marine insurance. The interest in both cases protected by the policy, must continue to the time of the loss. Neither of them is in its own nature assignable; but the interest

of the assured in each, where the terms of the contract are the same, is equally transferable by one to another. And the difference, in this respect, which usually prevails between them, results from the terms of the contracts, variances in the terms of the policies, and from the stipulations in the policies against fire, and not from the diversity of the contracts in their principles. See observations of Ch. J. Jones. 1 Hall. 113, *et seq.* and *Lynch* v. *Dalzell*, 2 Mar. on In. 801, reported in 3 Br. P. Ca. 49.

The kind of interest which it is necessary for the assured to have, will be considered in a subsequent chapter. It is sufficient for our present purpose to observe, that persons clothed with a special property in goods, such as powers of sale, or to carry, have a legal interest and may therefore insure. It is not necessary, that the assured should have a beneficial interest in the property insured. It is sufficient if he be clothed with the character of a trustee, an agent, or consignee. So also may the owner of an equitable interest in property, of which the legal title is in another, cause his interest to be insured under the general name of property, or by a description of the thing insured.

4. *Indorsements and Conditions of the Policy.*

The offices in general, in order to render the operative part of the contract more concise, introduce the scale of premiums applicable to the different risks by indorsements upon the policy, refering to them, so as to make them part of the contract; these indorsements usually consist of a table of premiums to be paid—1. In respect of such as are called "common insurances," or those for which the lowest rate of premium is to be paid, as buildings, which from their construction, materials, or use, are exposed to the least degree of hazard.

2. In respect of such as are called "hazardous insurances," as buildings which, from their materials or construction, are more susceptible of ignition, but in which no hazardous trades are carried on, or hazardous goods deposited; *buildings* not of a hazardous nature, as those of the *first* class, but in which hazardous trades are carried on, or some circumstances of hazard are attached, as the presence of stoves; the *stock* and *goods* of various specified traders, whose occupation exposes the goods to hazard, articles of trade of a hazardous nature deposited in buildings not hazardous.

For insuring these a higher rate of premium is to be paid. 3. In respect of such as are called "double hazardous insurance"—such as buildings, which from their construction or materials are of a hazardous nature in which hazardous goods are deposited, or hazardous trades are carried on, thus exposing the insurers to an increased liability of ignition, both from the nature of the buildings and the goods contained in them, or trades carried on, for insuring these a still higher premium is to be paid. There are cases also of *extraordinary risk*, as those of sugar refinerys and manufactories, not included in the usual tables of premiums. These are usually made the subject of special agreements, all the circumstances of the case being taken into consider-

ation. Money and securities for money, are not in general insured upon any terms.

After the tables of premiums, there usually follow the *conditions* or proposals, which the insured must comply with at his peril, as they form part of the policy and are conditions precedent, upon a due compliance with which must depend his right to an indemnity in case of loss.

The most important conditions are usually to the following effect:—the insured, upon effecting a policy, must give an accurate description of the construction and nature of the premises and goods to be insured, for upon that statement the insurers fix the amount of the premium to be paid, or exercise their discretion by rejecting the insurance altogether. This is a point of the utmost importance for a party about to insure to attend to, for even, without any *special condition*, a misrepresentation, whereby a less premium is paid than would be payable if a true statement had been made, even without a fraudulent intent, would, upon the common principles of insurance, be sufficient to render void the policy. *Roberts* v. *Fonnereau*, Park, 285. *Fitcherbert* v. *Mather*, 1 T. R. 12. Every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, or the goods therein, should be specially mentioned in the order given for the policy so that the risk may be fairly understood. If not so expressed, or if buildings and goods be described in the policy otherwise than they really are, or if after an insurance shall have been effected, the risk shall be increased by the erection or alteration of any stove, the carrying on any hazardous trade, operation, or process, the deposite of any hazardous goods, or in consequence of the formation of any hazardous communication the insured will, by the conditions of most offices, lose the benefit of his policy. (See protector Policy, Appendix.)

"Where the insurance is general on the building, or where a *store* in general terms is insured, the true construction of the policy undoubtedly is, that all kinds of business may be carried on, and all kinds of goods or merchandize kept in the building, except such as are *expressly prohibited*." Per Oakley, J. in *Langdon* v. *N. Y. Equitable Fire Ins. Co.* 1 Hall, 226. The policy contained a clause, that in case the building insured should at any time, during the continuance of the policy, be used for the purpose of carrying on any trade, business, or vocation denominated hazardous or extra-hazardous, as specified in the memorandum of special rates in the proposals annexed to the policy, "or for the purpose *of storing therein* any of the articles denominated hazardous or extra-hazardous, unless specially provided for in the policy, or subsequently agreed to by the defendants in writing; that then, so long as the same building should be so appropriated, applied, or used, the said policy should cease, and be of no force or effect." In the proposals annexed to the policy, *oil* and *spirituous liquors* are denominated hazardous articles. The plaintiffs contended, 1st. that the building being used as a "*store*," and the business of keeping a *grocery* store not being denominated hazardous, and therefore not prohibited by the policy, the plaintiff had a right to carry on that business, and to keep all such articles as are usually kept in such stores.

2. That if not, the keeping of the liquors and the oil, under the circumstances, was not a *storing*, within the meaning of the contract. Oakley, J. in delivering the judgment of the court, observes—"Some efficacy must unquestionably be given to the clause which prohibits the *storing* of hazardous articles, without the written consent of the defendants. If the right of storing such articles followed as appurtenant to the general business of a grocer, it would equally follow as appurtenant to that of a commission merchant. His business, *as such*, would not be prohibited by a policy like the present; and yet it might consist entirely in storing the hazardous or extra-hazardous articles enumerated in the policy.

"Thus it will be seen, that upon the construction contended for by the plaintiff, a case can scarcely be imagined in which the prohibition in the policy, against the storing of such articles, could be applied. The true meaning of the contract seems to me to be very clear and simple. The plaintiff is authorized to keep any store in the building insured, provided in doing so he does not use any part of it for the purpose of storing certain articles of merchandize, which are denominated hazardous or extra-hazardous in the policy itself.

"The only question then is, whether the keeping of the casks of oil and spirituous liquors in the cellar of the building, in the manner in which they were kept, is a violation of the prohibition in the policy.

"In the present case it appears, that the oil and liquors in question were purchased by the grocer, and deposited in the cellar. The cask of oil was unbroken, but the casks of liquors were partly drawn out. These casks were deposited in the cellar for the purpose of replenishing his store from time to time, as occasion might require. They constituted then a part of his ordinary stock in trade as a retail grocer and I am of opinion, that the keeping of them under the circumstances, and for the purposes of ordinary retail, and not in universal quantities, is not a *storing* of them, within the meaning of the clause in the policy under consideration.

"It is difficult, perhaps, to affix any precise meaning to the word *storing*, as used in the policy. Its import is in a degree vague and uncertain. Without undertaking here to define it, it is sufficient to say, that it does not, in my judgment, reach a case like the present."

The above case was carried to the Supreme Court and the judgment of the Superior Court was affirmed, 6 Wend. 623. Sutherland, J:—The trade or business of a grocer is not mentioned or specified in the proposals annexed to the policy. It was not therefore a prohibited trade. *Expressio unices, exclusio est alterius.* The enumeration of certain trades, or kinds of business, as prohibited on the ground of being hazardous, is an admission that all other kinds are lawful under the contract. The case of *Baker* v. *Ludlow*, 2 Caines, 288, is precisely in point. There *dried fish* were enumerated in the memorandum clause as free from average, *and all other articles perishable in their own nature.* It was held that the naming of one description of fish implied that other fish were not intended; and that the subsequent words, "*all other articles perishable in their own nature*, were not applicable to the articles previously enumer-

ated, and did not repel the implication arising from the enumeration of them. In Doe, ex d. *Pitt* v. *Lanning*, 4 Camp. 76. 7, Lord Ellenborough held, that a *coffee house* was not an *inn*, within the meaning of a policy of insurance against fire, enumerating the trade of an *inn-keeper*, with others, as double hazardous, and covered by the policy. If the business of a *grocer* is not prohibited under the policy, the ordinary incidents of that business, it would seem, were allowable, not being prohibited, the party had a right to keep a grocery store, and to conduct it in the usual manner. The cases of *Luckley* v. *Furse*, 15 J. R. 342, and *Kensington* v. *Inglis*, 8 East, 273, sanction this principle."

It is stated in a note (1 Hall, 234) that another objection raised against the plaintiffs right to recover in *Langdon* v. *The N. Y. Equitable Ins. Co. supra.* was, that the risk had been increased by the erection of a carpenter's shop in the rear of the building insured—distant 75 feet; but as the jury found under the direction of the court, that the risk was not thereby enhanced, that ground was abandoned.

In *Duncan* v. *The Sun F. Ins. Co.* 6 Wend. 488, the *proposals* annexed to the policy at the foot of the clause denominated *extra-hazardous*, in *enumerating* the goods *not hazardous*, and of goods, &c. *hazardous and extra-hazardous*, the following words were inserted—"gunpowder is not insurable, unless by special agreement:—Held, that gunpowder was included in *extra-hazardous* articles; and because the building insured was privileged to contain *extra-hazardous goods*, it was no breach of the contract to store gun powder therein. Savage, C. J. observes:—"Gunpowder is either included in extra hazardous, or forms a distinct class; if it forms a distinct class, then the printed forms permit gunpowder when it excludes articles hazardous and extra-hazardous, which are less combustible, and are insured at lower rates, which is an inconsistency not to be presumed or inferred. My inference from the manner in which the clause relating to gun-powder is printed, and from the fact that it is not treated as a distinct head or class in this stipulation in the policy, is, that it was considered *extra hazardous*, but not to be insured under that class at the rate of the other articles; and therefore to be excluded from any estimate of loss, unless specifically insured." "The conclusion is, that the plaintiff had a right; by the terms of the policy, to put gunpowder in his buildings insured; but in case of loss by fire, he is not entitled to compensation for such gunpowder; not having insured it by special agreement. If such is not the proper construction of the policy, then there is no positive exclusion of gunpowder as it is clearly not included in the paragraph headed *special mem.* ib.

So, in *Delonguemare* v. *The Tradesman's Ins. Co.* 2 Hall, 589, where in the memorandum of special rates in the proposals attached to the policy, carpenters in their own shops, were classed among the trades and occupations deemed extra-hazardous, and for the insurance upon which, an extra premium was to be charged; Held, that as it appeared that a carpenter was a necessary workman in the manufacturing establishment insured and was required for the ordinary purposes of the manufactory, it was allowable as a necessary branch of the factory, and on that ground, it was innocent. Jones, Ch. J.

observed:—" The express written agreement of the company to insure a manufactory of china ware in full operation, inserted in this policy, necessarily authorized the exercise of those trades and avocations, in the buildings insured, which appertain to the establishment, and were required for the judicious management and transaction of its accustomed operations and business. It follows, that the general printed clause against the exercise of extra-hazardous trades, must be restricted in its operation, to trades which the conductors of a china factory do not require for the transaction of the ordinary business of the establishment, and cannot be applied to any trade or vocation necessarily or usually attached to such manufactories."

Again—" All manufactories requiring the use of fire heat, are, by the same memorandum, denominated extra-hazardous; yet fire heat is the principal agent in the manufacture of china ware; and to deny to the assured the liberty, or right to carry on that manufacture in these buildings, because it requires the use of fire heat, would be to defeat the object of the insurance, and to deprive the plaintiff of the chief benefit of his contract. The proposition when pushed to that extent, becomes too preposterous to be seriously defended, and it must be equally indefensible in its application to any component part of the manufactory, or any trade or vocation, inseparably or necessarily connected with its ordinary operations."

Oakley, J. added:—" *Carpenters in their own shops, or in buildings erecting or repairing*, are denominated *extra-hazardous* trades, or business, in the proposals annexed to the policy." " It clearly appears, that at the time of the fire, there was one carpenter in the building. He had a work bench in one of the rooms, with some tools; but was not then employed in erecting or repairing the buildings. His work consisted in making " *drying racks*," and in planing boards to *set the china ware upon*; and it was intended to keep a workman of that description permanently attached to the factory.—This cannot be considered as a carpenter working in his own shop, or *in erecting or repairing* the buildings insured. It would seem rather as a part of the general business or trade of the china factory, and to be specially authorized by the policy."

Insurance against fire on a granary, with a kiln for drying corn attached. One condition indorsed on the policy stated, that unless the trades carried on in the insured premises were accurately described, and if a kiln or any process of fire heat were used and not noticed in the policy, the policy was to be void. Another condition stated, that if the risk to which the premises were exposed, were by any means increased, notice was to be given to the office, and allowed by indorsement on the policy, or otherwise the insurance to be void. A cargo of bark having sunk near the premises of the plaintiff, (the insurer), he allowed the bark to be dried at his kiln gratis, and in consequence of the fire at the kiln during this process, which lasted three days, the premises were burnt down. In an action against the insurers, the jury found that the drying bark was a more dangerous process than drying corn: Held, first, that a user of the kiln for a different purpose than that intended at

the time of the policy did not constitute a misdescription or omission within the first condition.

Secondly, that a single user of the kiln as a bark kiln, gratis, was not such an alteration or increase of the risk as required notice.

Thirdly, that the two conditions taken together did not amount to a warranty that the plaintiff would not use the kiln for any other purpose than drying corn.

Fourth, that though the fire is occasioned by the negligence of the assured, he not being guilty of fraud, may recover. *Shaw* v. *Robbunds*, 1 N. & P. 279.

All persons who have sustained any loss or damage are, in general, to give immediate notice to the office and deliver a statement of their loss, supported by the evidence required by the rules of the respective offices; and according to the practice of some, the *certificate* of the clergyman of the parish, the churchwardens, and some other respectable inhabitants, is made one of the modes of evidence of the amount of the loss. The production of this certificate has been held to be a *condition precedent*. (*Roberts* v. *Fonnereaux*, Park, 285. *Fitzherbert* v. *Mather*, 1 T. R. 12,) in the absence of a compliance with which the assured cannot recover. As there is no mode of compelling the clergyman, churchwardens, or inhabitants to certify, a hard case, is sometimes incurred by the insured; a clergyman may sometimes refuse to certify, not from the intention of throwing an imputation upon the character of the insured, but because as the minister of a large parish he has little opportunity of becoming acquainted with the character of the insured, the particular circumstances of the fire, or form any estimate of the loss: this mode of proof has therefore been abandoned by many of the offices in England.

The acts required to be performed by the proposals annexed to the policy are conditions precedent, without the performance of which the plaintiff cannot recover his loss; performance therefore must be averred in the declaration; otherwise it will be fatal upon demurrer, or judgment will be arrested after verdict. Therefore, where the ninth condition annexed to the policy, provided, that all persons sustaining loss or damage by fire shall *forthwith give notice* thereof to the company, and as soon thereafter as possible deliver in a particular account of such loss; and the property was consumed on the 23d Feb. and notice was given on the 2d of April following: Held, that this was not a compliance with the condition. *Inman* v. *Western Fire Ins. Co.*, 12 Wend. 452. However, it imposes upon the party only due diligence, under all the circumstances of the case. ib. There must be no unnecessary procrastination or delay; nothing which the law calls *laches*. ib. *Cornell* v. *Le Roy*, 9 Wend. 165, 6.

"Where the thing required to be done is complicated, composed of a variety of parts, incapable in the nature of things, of being instantly accomplished by a single act or volition, the parties will be understood, when they use language of this prompt and imperative character, as intending merely that there shall be no unnecessary delay in the performance." Per Nelson, J. in 12 Wend. 460, 1.

The rule is not so strict as to render it necessary that the certificate should

be in the precise words mentioned in the policy, provided it be so drawn as to mean the same thing. It is sufficient if the loss be in substance according to the terms of the policy. Thus, in *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend. 385—12 ib. 512 S. C., where the condition required the assured to procure the certificate of a magistrate that he is acquainted with the character and circumstances of the assured, and that having investigated the circumstances in regard to such loss, knows or verily believes that the assured really, and by misfortune and without fraud or evil practice, has sustained by such fire, loss or damage to the amount therein mentioned:—Held, that a certificate of the magistrate, that he resided within two miles of the assured, and that he was acquainted, which amounted substantially to the same thing, was sufficient. Held also, that although the declaration stated the loss at $1500, which was the amount insured, and the affidavit stated the loss at nearly $2500, exclusive of furniture; and the certificate of the magistrate adopted that amount as true, the variance was not material; for the plaintiff did not profess to set out the certificate in *hæc verba*.

In general, persons insuring are to give notice of any other insurance made elsewhere upon the same property, in which case the insurers are only to be liable to the payment of a rateable proportion of any loss or damage; even without a special condition of the policy, a party insuring effecting a *double* insurance can only recover the real amount of his loss, and if he sues one insurer for the whole, that insurer may compel the others to contribute their proportional parts. *Newby* v. *Read*, 1 Bla. 416. *Rogers* v. *Davis*, Beawes, Lex. Merc. 242. *Davis* v. *Geldart*, Beawes, *ubi supra*.

In the policies of most Offices, there is a condition, that if there appear any fraud in the claim made for the loss, or *false swearing* or *affirming* in support thereof, the claimant shall forfeit all benefit under the policy. Now *fraud* is in law *allegatio falsi* or *suppressio veri*, and therefore any wilful misstatement of the extent or amount of the loss, in the claim preferred, with the view to injure the office, may subject the insured to lose his indemnity even in respect of that loss or damage which he has actually sustained. In the case of *Wood* v. *Masterman et al*, K. B. Feb. 11, 1822. M S. cited in Ellis, 14, in which a claim was resisted, and the condition vacating the policy in case of fraud was insisted on by the insurers, Ld. Tenderden told the jury, that if they thought the plaintiff had overrated the amount or value of his loss from mere mistake or misapprehension, they would find only for such loss or damage as he had actually incurred; but if, on the other hand, they thought he had done so with a fraudulent intent, then they should find a verdict for the defendants. There are rules which the Offices have been obliged to adopt for their own security. In the multiplicity of their concerns, it would be absolutely impossible for them to ascertain the truth or falsehood of representations made to them at the time the insurance is effected; as the knowledge of all the facts necessarily rests with the insured, he is bound to furnish a true statement, upon which he is to stand or fall. The offices, however, are seldom in the habit of availing themselves of the clause relating to fraud, unless they have good reason to suppose that a *gross* imposition is attempted

to be practised upon them. When a person insured, demands twice as much in respect of his loss or damage as he can give any probable evidence of, or a jury will give him, (and juries are in general very liberal to the public as against the offices,) it is a fact which strongly indicates fraud; and in a recent case of *Levi* v. *Baillie et al*, (certain directors of the Palladium,) 7 Bing. 349. it appeared that the policy of insurance upon which the action was brought contained the usual condition, requiring the insured suffering a loss to deliver in to the office as full an account thereof as the nature of the case would admit of, accompanied by the usual evidence; and it also contained the other usual condition, that "if there should be any *fraud in the claim made*, or false swearing or affirming in support thereof, the claimant shall *forfeit all benefit* under such policy." The plaintiff, an upholster, carried on business in a small house, in the New-cut, in St. George's Fields, and the insurance to the amount of 1,000*l.* was effected on his stock in trade, the 22d of Nov. 1827. The premises were burnt down on the night of the 14th Feb. 1830. The plaintiff made affidavit, that in consequence of the fire, he had sustained a loss of stock to the amount of 1,085*l.* viz. 85*l.* for goods which were injured in the removal, and 1,000*l.* for goods which had been abstracted by the crowd assembled on the occasion, and had never been recovered. The goods so lost were alleged to consist of four post bedsteads, mahogany tables of various sizes, couches, chairs, chimney glasses, pier glasses, carpets, and the like.

The defendants contended that this claim was *fraudulent*, and called witnesses to show that it was impossible for goods so numerous and bulky to have been carried off undiscovered. These witnesses stated that police men were on the spot as soon as the fire broke out; that a cordon was established round the premises almost immediately; that the fire was over in about two hours, and that no article of size could have been carried away. The plaintiff's witnesses denied the blockade had been so effectual; and the C. Justice left it to the jury to say whether the plaintiff had made a *fraudulent* demand or not. The jury having found a verdict for the plaintiff with 500*l.* damages. Taddy, sergeant, obtained a rule *nisi* for a new trial, on the ground that the finding of 500*l.* damages, instead of the whole amount sworn to by the plaintiff, amounted, in effect, to a verdict for the defendants, under the condition which avoided the policy if there were any fraud or falseswearing in the plaintiff's claim; a claim of 1,085*l.* where a party had lost 500*l.* could not be otherwise than fraudulent. He also objected to the verdict as contrary to evidence.

Wilde and Andrews, Sergeants, who showed cause, contended that the finding of the jury was not necessarily a proof, that there had been any fraud in the plaintiff's claim, he might, by mistake, have estimated the goods lost at more than their value; as to the probability of the loss, the evidence was merely conflicting. But the Court having taken time to consult, made the rule absolute on payment of costs.

A remark may be made (says Mr. Ellis) upon another singular feature of this case, that the claim in general was made, not in respect of goods *lost* or

damaged by fire, but in respect of goods *abstracted* in consequence of the opportunity which the fire afforded. It does not appear whether the learned Judge directed the jury upon this point, though it might be supposed that a jury would not have found damages to such an extent without a direction to that effect.

" In consequence of the numerous fires which have recently taken place in the agricultural and manufacturing districts by the acts of incendiaries, the offices (in England) in general have been under the necessity of adopting the *average clause* in their policies upon farming stock, by which, where a person insures property collectively of larger value than the amount insured, he shall only recover in the proportion in which the whole value bears to the part insured. (See Appendix.) For example, if having property worth 10,000*l.* he insures it only for 1,000*l.* in case of a fire producing loss or damage to the amount of 1,000*l.* he will recover only 100*l.*" ib.

" As an encouragement to the insured to use active diligence in the preservation of property after a fire has broken out, it frequently forms a part of the proposals that the office will repay all real and actual expenses incurred in the removal of goods in case of fire. It is indeed difficult to conceive any conduct more nearly approaching to fraud, if not partaking of it, than for a party insured to abstain himself, or prevent others, from using every possible means to extinguish the fire, or save the property from destruction. ib.

CHAPTER II.

OF THE PROPERTY AND INTEREST OF THE INSURED.

The wisdom of our law, at the present day, requires that the insured shall be interested in the prosperity sought to be protected. But an insurable interest, in mercantile language, does not necessarily import an absolute right of property in the thing insured. A special or qualified interest is equally the subject of insurance; and it has often been determined, that each distinct interest in the same subject, may be protected by a separate policy, for the party interested in it. Every party who has any special interest to protect, or who represents the property as the qualified owner of it, may insure; and in the latter class of cases, the sole question is, whether the special interest alone, or the entire subject is covered by a policy effected upon the property in the name of the qualified owner. And that question may turn upon the nature of the ownership or interest, the purposes for which the property is held, and the powers incident to the relations of the special owner, or necessary to the safety of the insured premises; or it may be settled by usage or course of dealing. See observations of Chief Justice Jones, 1 Hall, 102, 3.

The freight a ship would earn is no part of the damages, unless the goods are on board. *Tonge* v. *Watts*, 2 Str. 1250. Risk is the subject of the contract of insurance. If there be no risk, no insurable interest, there can be no contract. It is necessary to prove some interest, to entitle the insured to an indemnity. *Hart* v. *Delaware* Ins. Co. 2 Wash. C. R. 350. There must be something in which the insured has an interest, or the contract is void. *Adams* v. *The Penn. Ins. Co.*, 1 Rawle, 106, 107. In *Lynch* v. *Dalzell*, 4 Bro. P. Ca. 431, ed. Tom. Lord Chancellor King said, in a case where a policy upon a house and goods had been assigned after the fire happened, "the party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." And Lord Hardwicke said, "I am of opinion that it is necessary that the party insured should have *an interest or property at the time of insuring and at the time the fire* happens. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay if lost. Now these insurances from fire have been introduced in later times and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted you cannot recover unless you prove a property." *The Sadler's Company* v. *Badcock*, 2 Atk. 554.

If a landlord insuring wishes to secure the payment of *rent* from his tenant, in case the premises occupied by him should be burnt, it ought to be specified in his policy; for a landlord, upon a lease containing a covenant for payment of rent, as is usually the case, does not lose his right in consequence of the premises being burnt, and therefore needs no indemnity; besides, rent is not a loss or damage by fire, it may be hazarded or even lost in consequence of a fire, but it never yet seems to have been distinctly held that a policy can cover a *consequential* loss or damage; for if so, an office might be called upon to compensate for loss of *business* or *misfortunes* in trade which might eventually take place in consequence of a fire, and such an indemnity for losses is certainly not contemplated by the insurers.

In considering the interest of the assured, the subject naturally divides itself into the amount or quantity of interest, and into the different sorts of insurable interest.

1. *The amount or quantity of interest.*—The sum mentioned in the policy is regarded as the extent of the insurer's liability, and not as the measure of the assured's claim. The insurance is against the loss or damage which the party interested in the premises may sustain, whatever the loss or damage may be, provided it does not exceed the sum mentioned in the policy, to which the indemnity is limited. It is not a contract to pay that particular sum in case of loss, nor a stipulation that the value of the property shall, in such case, be estimated at that sum. The undertaking is to pay the amount of the actual loss or damage, but with the restriction of the amount of the payment of the sum mentioned in the policy. This intentton of the parties is not left to the construction of the terms in which the property is expressed to be insured. The insurers expressly promise and agree in the policy to make good to the insured, or his personal representatives, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property specified in the policy during the continuance of the insurance, the loss or damage to be estimated according to the true and actual value of the property at the time the fire shall happen. These stipulations are general, and apply equally to every species of loss or damage, total as well as partial; and they exclude all pretension to the claim of the sum mentioned in the policy in any case as a valuation of the subject of the insurance, or as liquidated damages recoverable by the insured. The printed conditions annexed to the policy requiring the persons sustaining loss or damage by fire, to give notice thereof to the insurers, and to deliver in a particular account of such loss or damage, signed and verified by oath, and supported if required, by the books or proper vouchers, conclusively show the contract to be understood by the parties as an open policy, and conclude the assured from claiming satisfaction beyond the actual value of the property he loses by the fire at the time of the loss. See Observations by Jones, C. J. in 1 Hall, 45 *et seq.*

Assuming that the principle of valuation may, by the mutual agreement of the parties, be applied to an insurance against loss or damage by fire, still the policy must be specially adapted to the case, and must express on the face of it the assent of the parties to the valuation agreed upon between them. ib.

The contract of the assured entitles him to recover the full value of the property at the time of the loss, if the full amount is covered by the policy. And if the actual value exceeds the sum insured, he will of course be entitled to the whole amount of his insurance towards his indemnity. The rule or principle of valuation is the actual value of the property ;—its full and intrinsic value is the standard, and not its relative value to the owner. Thus in *Laurent* v. *The Chat. Fire Ins. Co.* 1 Hall, 41, a building standing upon leasehold premises was insured to the amount of $800. It appeared in evidence that the lot of ground belonged to Livingston who had leased the same to the plaintiff for a term, which expired on the first day of Sep. 1827, and the building was destroyed by fire on the 15th day of August next preceding. The lease had not been renewed, and the plaintiff had not given any notice of his desire to renew the same, but the lease contained a clause, entitling the lessee to a renewal upon the terms expressed therein. The building was erected by the assured, and according to the evidence was worth about $1000 as it stood upon its location at the time of the fire ; but one witness for the defendants stated, that if it had been necessary to remove it from the lot, he would not have given more than $200, for it. The question was, whether the assured was entitled to recover the whole amount of the sum insured, the same falling short of the intrinsic value of the tenement, or whether he was to be restricted to the $200, as the value of it under the circumstances of its being to be removed from the premises. The Court held him entitled to recover the full amount of his insurance. It was contended that the principle of indemnity which pervades the contract of insurance must control the construction of the contract ; and upon that principle it was insisted that the value of the property to the assured at the time of the loss, circumstanced as it then was, in reference to his use and enjoyment of it, was the loss he sustained by the destruction of it, and should be the measure of his indemnity for the loss. But the Court said ;—"if this principle of indemnity is to be admitted, the extent and value of the recovery will in every case vary, with the special and peculiar circumstances of the insured, and the local advantages or disadvantages of the building, and the uses to which it is applied ; and the instrinsic value of the building, will form no criterion of the loss of the proprietor in case of its destruction. A building, for example, which the necessities of the owner compel him to offer at public sale, for ready money, will be worth no more to him than what it will produce at such a sale, and a building for which there happens to be great competition, will command a much higher price than its true value." These incidental and collateral circumstances are not to enter into the estimate of value under the contract of insurance. "It is the tenement upon which the insurance is made ; and the actual value of it as a building, is the loss of the insured in case of its destruction by fire. To that measure of indemnity the proprietor is entitled, however unproductive the property may be, and he is entitled to no more, whatever revenue he may have derived from the tenement." By Jones, C. J. ib.

"It is the true and actual value of the tenement itself at the time, independ-

ently of its location, or the insecurity of the title, or terms by which it is held that the insurers agree to make good to the present proprietor in case the loss or damage by fire happen during the continuance of his ownership, and within the term of the insurance. It is of no importance, whether the tenement stands upon freehold, or upon leasehold ground, or whether the lease is about expiring, or has the full time to run when the fire occurs, or whether it is renewable or not. The condition of the policy is satisfied if the title and ownership are in the insured at the time of the insurance, and at the time of the loss, and the measure of his indemnity is the amount of his interest in the tenement when destroyed by fire, notwithstanding that the whole interest would have expired the very next day, or soon after the loss occurred. But whether there may not be incidents, and special circumstances so intimately connected with the premises, or so permanently attached to them as to affect their intrinsic value, or the insurable interest of the party, who effects the insurance upon them, I am not prepared to say; and it is not material to the decision of the question before us to inquire, for this clearly is not such a case. In this case the tenement belonged exclusively to the insured, and the lease of the lot upon which it stood had 15 days to run, and was moreover renewable." ib.

The insured pays the premium upon the whole sum, and he insures for the entire risk of the property to that amount, during the whole term of the policy. He has a right, therefore, to claim the amount he thus insures, if he loses property of that value by the peril, during the continuance of the risk; but if other considerations are to enter into the calculations of value, and he is to be paid at a reduced rate, because in certain contingencies the property might fail to produce to him the full value of it as it stood at the time of the loss, he will not have the full benefit of his insurance, for which he has paid the full premium. ib.

2. *The different sorts of insurable interest.*

(*a.*) *The interest of mortgagor and mortgagee; or, the legal and equitable interest of the insured.*—"A bona fide equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured." 13 Mass. 67. And again, "several persons, having several interests, may insure to the full value of that interest." ib.

An insurable interest must be in general either a right of property or a right derivable out of some contract concerning the thing insured. The interest may be either legal or equitable, absolute or defeasible.

Both the trustee and the *cestui que trust* have an insurable interest, the former in respect to his legal interest, and the latter in respect of the equitable interest. *Ex parte Houghton*, 17. Ves. jun. 258; S. P. 15 ib. 67.

A vested interest is not necessary to give the right of insuring. Where there is an expectancy coupled with a present existing title, there is an insurable interest. *Lucena* v. *Crawford*, 3 B & P. 75; 5 ib. 289. S. C. One,

having an equitable interest in property, may insure to the full value of that interest, although the legal title is in another. And the insurance may be made upon the property generally, without representing the interest he has; unless there should be a concealment, after enquiry, of the true state of the property, or a false affirmation or representation. Thus, where the cargo of a ship was pledged as security for the money with which it had been purchased; the bill of lading and invoice being in the name of the lender, who was to receive his pay from the proceeds thereof; but the surplus was to belong to the borrower, for whose account the cargo was shipped: Held, that the latter had an insurable interest in such cargo. *Locke* v. *North America Ins. Co.* 13 Mass. 61. A mere equitable title, or any qualified property in the thing insured, may be legally protected by insurance. *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. R. 25. A legal title to the property insured is not necessary to give validity to such a contract. And it is well settled that a mortgagor may protect his equitable interest at any time until actual foreclosure of the mortgage. Per Wilde, J. in *Strong* v. *Manufacturer's Ins. Co.* 10 Pick. 40. The value of the interest is not material; if the plaintiff had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of damage to the property, not exceeding the sum insured. ib. A right in equity to redeem, may constitute a valuable interest; and independently of any circumstance tending to show that a right of redemption is a valuable interest, the law will presume that it was, the contrary not appearing. ib. The same principle was recognised in *Tyler* v. *Aetna Fire Ins. Co.* 12 Wend. 507; 16 ib. 385. S. C.

A mortgagor and mortgagee may each insure the same building, and their particular interest need not be described in the policy; it may be described as the property of the insured. The nature of the interest need not be disclosed. Thus, a mortgagor effected an insurance and with the consent of the insurers assigned the policy to the mortgagee. Subsequently, the mortgagor effected another insurance at another office, without notice to the first insurers; and it was held, that the mortgagee was entitled to recover on the first policy, in the name of the mortgagor, although there was an express condition in the policy that the policy should be void in case of a second insurance and neglect of notice by the assured or his assigns. *The Traders Ins. Co.* v. *Robert*, 9 Wend. 404. A mortgagor may represent the estate mortgaged as his property, although the legal estate is in the mortgagee. By Wilde, J. 10 Pick. 535.

Although the mortgage is to the full value of the property, the mortgagor has an insurable interest, 2 Pick. 249; yet if the assured make an assignment of the subject of insurance for the benefit of his creditors, he must show a probable surplus in order to entitle him to recover. *Lazarus* v. *The Commonwealth Ins. Co.* 5 Pick. 76.

A plaintiff in possession under a contract of purchase, and having made a payment and valuable improvements, has an insurable interest in the premises, although the fee of the land was in another. *M'Givney* v. *The Phœnix*

Ins. Co. 1 Wend. 85. The property in common parlance is called his; and he may insure it as owner, 12 Wend. 507; 16 ib. 385. S. C.

Although the assured represent the property as *his* property, when in truth he had no property in the subject of insurance, except in right of his wife, and in common with her sister; yet, it being true in substance, it was held not to vitiate the policy. By Wilde, J. 10 Pick. 535.

There is a manifest difference between a mortgage of real and personal property; the former is merely a security for the debt; the mortgagee has only a chattel interest, and the freehold remains in the mortgagor; it cannot be sold by the mortgagee on default of payment without a bill of foreclosure and a decree of sale. Whereas the mortgagee of personal property has an absolute interest in the thing mortgaged after the condition is forfeited, so that the mortgagor cannot, by tendering the debt, entitle himself to an action of trover against the mortgagee, 8 J. R. 96; 7 Cowen, 290; 2 Ves. Jr. 378; See also 9 Wend. 80 and 11 ib. 106. Therefore where policies were effected on a steamboat *on account of whomsoever it might concern* at the time of loss; the loss, if any, payable to S. & W., first deducting the premium note if unpaid. The company paid the loss to S. & W. though notified of an assignment of their interest. The Chancellor in delivering his opinion makes the following observations.—"In this case the underwriters contemplated that a change of ownership of the boat might take place during the continuance of the risk, and intended to insure whoever might be the owners from time to time, so that those who should be interested as such owners at the time when any loss should occur, should have the benefit of the policies." "But as the policy in terms insured whoever should be the owner of the boat at the time of loss and Stow was then the owner of one quarter by virtue of the assignment from D., all pretence of a lien upon that portion of the insurance money for any general balance, which might be due from D. and Co. entirely fails." 6 Paige's Ch. R. 583. In such case, no assignment of the policy is necessary, and the printed clause requiring notice to the insurers in case of an assignment of the policy is inoperative.

(*b.*) *The interest of Consignees, Factors and Commission Merchants.*—Not only in the case of a purchase, but also in the case of a consignment by a debtor to his creditor, or in any case, where the consignee has a lien upon or a special interest in the goods, he may protect the same by an insurance. Hughes on Ins. 37. Even a naked consignee may insure for the benefit of his consignor. But to constitute an insurable interest, the assured must have some charge, claim, or lien on the ship or goods upon the safety of which the policy is made to depend. ib. p. 39.

It is laid down by Mr. Phillips in his Treatise on Insurance (p. 44.) that the insurable interest of a consignee or factor, is limited to the extent of his lien. But the case of *De Forest* v. *The Fulton Fire Ins. Co.* 1 Hall. 84, decides that a factor or commission merchant may insure the goods of his principal *in his own name* to the full value of the goods consigned for sale without regard to the lien. The policy was effected upon goods "*as well the property of the*

assured, as held by them in trust or on commission." The court decided that the commission merchant might sue upon the policy by setting forth the facts according to the truth of the case—averring the interest to be in himself, and concluding also to his own *damage :* and in such case he was entitled to recover for the amount of the entire loss sustained on the goods he held on consignment for sale. Mr. Justice Oakley in delivering his opinion, alludes to the observations of Mr. Phillips just referred to; and remarks that he gives no authority for his position ; and he lays it down without any discrimination between Marine and Fire Insurance. It might be well contended, (if it were necessary,) that a more liberal rule ought to be adopted, as to the extent of the insurable interest of a factor, in the case of insurance against fire, than in the case of marine insurance. The convenience of trade would seem to point out and sanction a difference, in the application of the rule to the two kinds of insurance." The observations of Chief Justice Jones, in the same case, are to the same effect. " I observe that there is a wide difference between the insurance of goods against maratime risks on the voyage of exportation, and the protection of them by insurance while in store, against fire. In the first place, the consignee has not the full possession of them, and is not invested with all his powers over them, until the arrival and delivery of *them* to him. But without laying stress upon that circumstance, I observe, in the next place, that the great reason why the consignee for sale does not insure, and is not expected to insure against maritime risks on the voyage of importation without an order for the purpose, is, that the consignor, in such cases effects the insurance himself, and he does so, for the most cogent reasons. He is on the spot, capable of determining for himself whether he will insure or not ; and if he prefers insuring, can select his own underwriter, and be sure of having the property satisfactorily covered. If he trusts to his foreign correspondent he may be disappointed ; his orders may miscarry, or not arrive in season, or his consignee may fail, and besides, in case of loss, the insurance if made by him at home will be the more readily and more easily realized, and with greater advantage to himself, than if to be collected by agents abroad, and remitted by them to him. He therefore will seldom trust a concern so interesting in its consequences to his factor abroad, when he can attend to it himself at home. And hence it is, that orders to insure are not usually given to consignees, unless they are required to make advances on the goods in anticipation, and the insurance is to be for their own protection and security. The consignee, therefore, would not, ordinarily, insure against the maritime risk of the voyage, without the orders of the consignor, or some reason to induce the act. But if he should, upon the receipt of the bills of lading, effect insurance bona fide, and for just cause, upon the goods consigned to him, for the voyage of importation, I am not prepared to say, that the contract would be void, or that the charge of the premium could be rejected by the consignor. But the objection to a maritime insurance, on the goods, on the voyage, does not apply to the insurance against fire, during their continuance in the warehouse of the factor, waiting for buyers. That insruance devolves immediately, and almost of necessity, upon the factor. He

has the exclusive possession and charge of the goods. He is interested in the safety and profitable sale of them; has the means of reimbursing himself the premium, and possesses all the knowledge of the place of deposit, which is required to effect a valid insurance upon them. But the consignor, from his distance, and his want of local knowledge, will be unable to judge of the necessity of insurance, or the nature of the risk, or to describe the building, in which the goods may be stored, with sufficient certainty for a binding contract.

"These considerations satisfy me, that in principle the consignee, who has the actual possession of the property, with plenary powers of sale, must be clothed with a special property in the goods, so as to enable him to effect a valid insurance upon them in his own name, and to entitle him to recover for the loss of them, upon an averment of interest in himself. I have found no adjudged case necessarily impugning that conclusion; and the current of judicial opinion is in favor of the principle. But again; if it should be conceded that the consignee has not the right to insure the goods of his principal under other circumstances, or against other risks, he must, I think, from necessity, be vested with the power to insure against loss or damage by fire, in his warehouse, for the safety of the goods while they remain in his hands for want of buyers. And if his special property does not (though I think it does) give him the right to insure, as upon an insurable interest in himself, beyond his own beneficial interest, or subsisting liens, he must still have the special power at his discretion, and without any specific instructions to effect insurance on the surplus interest for the benefit of his consignor. And in this point of view, the usage found by the jury might have an important bearing upon the rights of the parties. For, if such insurances are sanctioned by usage, those who send their goods to a market where the custom prevails, must be presumed to know its custom, and to act upon the knowledge of it, in regulating their consignments. And these defendants, who knew the plaintiffs as commission merchants, and were apprised by the declaration of the policy, that the insurance was to be upon goods held on commission, must be taken to have entered into their contract with reference to the usage, and must abide by its influence on their liability. The general prevalence of such a custom might account for the absence of orders to insure: the consignees choosing to trust to the judgment and discretion of the factors residing on the spot, and possessing a full view of the whole ground, as to the expediency of insurance against fire, rather than to bind them down by express orders to the duty of insuring at all events. It would be difficult to account for the indifference and inattention of the consignor's interests, which the neglect to give the orders would otherwise manifest, upon any other supposition than that of a settled conviction on their part, resulting, from past experience, or the advice of counsel, of the right of the consignee to insure, and a confidence in the judicious exercise by them of the power, or that of a reliance upon the conformity of the consignee to an established usage for the factor to keep the goods sent to him for sale, under insurance, until sold.

"But it is contended, that such an insurance would be for the indemnity

of the owner of the goods; and to be sustainable as an insurance for his benefit, and on an implied authority from him; the policy must be in his own name, or the terms of it must be sufficiently comprehensive to embrace him, and cover his interest; and that the loss, moreover, which may happen, must be recovered on an averment of interest in him. These may be requisite of an insurance effected by an agent, insuring by the order, and on the account of his principal solely, or by a naked consignee, who has the possession merely without the power to dispose of the subject he insures; and they are rules which apply also to policies expressly declared to be for the benefit of the principal, and not professing to be upon any interest of the agent or factor, who effects them. But can they be applicable to this contract? It surely could not be necessary to the validity of this insurance, that these factors should insert the names of their principals in the policy. Such a requisition could subserve no valuable purpose, and would be embarrassing in the extreme, and often times impracticable. An insurance, like the present is for the protection and indemnity of the commission merchant, against loss or damage to any goods or merchandise, that may then belong to him, or be held by him for sale on commission, as the factor of others. And it cannot be foreknown whose goods will be there at that time. The insurers, therefore, admitting them to be entitled to notice of the names of individuals intended to be benefited by the policy in ordinary cases, have dispensed with it in this case, by becoming parties to a contract which necessarily precludes the disclosure. But there was no difficulty in stating the insurance to be for the benefit of whomsoever it might concern. If the contract could be viewed simply in the light of an insurance for the use of the plaintiffs and others, for whom they acted as agents, some general expression might be requisite to extend its protection to the assured, who were not specifically named in the policy. But this is an insurance by factors, upon goods held by them on consignment for sale; and even if the law did require, as a general rule, that such insurances should be for the account of the principals, and that to render the contract available to them, the factor must adapt his policy to the form prescribed for other agents, this contract appears to me to dispense with that condition; or, rather, to require a substitute for it, which probably was supposed to be of greater value to the insurer. By the third article of the conditions subjoined to the policy, and made part of it, goods held in trust, or on commission, are to be declared and insured as such, otherwise the policy will not cover such property. Can the sense of this provision be misunderstood. Does it not import, that if the condition be complied with, by the disclosure to the insurers, that goods held on commission are to be the subject of the insurance applied for, the property shall be covered by the policy? And if such be the true construction of the clause, it amounts to an agreement, that all the goods in which the assured should be found to have either an absolute interest as owners, or a qualified property as factors, should be covered by the policy, and the satisfaction, in case of loss, be made to the assured, as representing the entire intererest in them.

"I am unable to perceive any ground, (adds Mr. Justice Oakley) in princi-

ple or good sense, why this contract (contract of insurance) ought not to be viewed in the same light with the contract of sale: and why the factor may not in the one case, as much as in the other, be considered as the owner of the property, for the purpose of entering into the contract, or of recovering damages for the breach of it. The effect of a sale of goods, by a general factor, although he acts against his secret instructions is founded on the custom of merchants, and in the safety and convenience of commerce. It is equally important that such a contract of insurance, as the present, should be supported on the same grounds."

The interests of consignees or factors, in effecting marine insurance, have been alluded to by the judges in several English cases. Thus in *Lucena* v. *Crawford*, 3 B. & P. 95, it is said "it is not necessary, that the assured should have a beneficial interest in the property insured. It is sufficient if he be clothed with the character of trustee, an agent, or consignee." And Lord Eldon remarks, that "a trustee has a legal interest in the thing and may therefore insure. So, a consignee has the power of selling." 5 B. &. P. 289, S. C. House of Lords. The observations also of Lord Kenyon and Mr. J. Grose, in *Crawford* v. *Hunter*, 8 T. R. 13, are to the point that trustees or consignees may insure.

The practice of insurance against fire, on the property of the foreign merchant, in the hands of his consignee, greatly tends to promote the interests of trade, and it ought to be upheld by any means not inconsistent with established rules of law. By Oakley, J. in 1 Hall, 130, 1. As it relates to his principal, the factor has no right to deal with the property consigned to him, otherwise than according to his instructions. The interest of the latter as between him and his principal may justly be said to extend no farther than his lien. But as between the factor and third persons, his powers and rights are of a very different character. And it may be affirmed, that in all questions relating to the property in his hands, arising between the factor and third persons, the former, (the factor) is, without the positive interference of his principal, considered by the law, as the owner. As respects the public, he is treated as such: for if a felony be committed of the goods, the indictment may aver the property to be in him. So in case of *trover* or *trespass*, the factor may sue as owner of the goods. The damage is laid in the declaration as *his*. So he may sue for and recover the price of the goods sold in his own name. See Observations of Oakley, J. in ib. p. 132, 3 J. Ch. R. 573; 5 ib. 429; *Hulse* v. *Young*, 16 J. R. 2. The possession of the property is coupled with an interest, and for all purposes connected with the custody and disposition of the property, the law considers the factors as owner; and as such they may enter into any contract with third persons in relation to the goods in their hands, which becomes necessary or expedient in the execution of their general powers. The contract of insurance, by a factor, against fire, falls clearly within the general principle. It is a contract for the preservation and safe keeping of the property, until it can be sold. The conclusion, therefore, to which we arrive both from principle and authority is, that a general factor, having possession of the goods, is to be considered in law, as having an insurable

interest, in the whole amount, without reference to his lien. He may insure them in his own name, and recover the amount payable for the loss, on an averment of interest in himself. The test of liability of the underwriter is the insurable interest of the assured. And the factor or commission merchant is not required to sever his insurance upon the property, or to open distinct policies upon the goods of each consignor, or to specify therein, several consignments; for the risk on each is the same, and the whole is under the direction of the same agency. The whole therefore, may be covered with one insurance, in the name of the consignee who has the possession and charge of the whole.

Supercargo.—The supercargo, as such, has no possession of the goods, or power over them during the voyage. His trust is, to sell in the foreign market, and his duty commences on the arrival of the ship. The right, or power to insure against maratime risks, is not within the scope of his authority, and does not result from any necessity. If indeed he be vested with special powers, he would in such case acquire the corresponding right. And where the goods are landed, and his instructions require, or authorise him in given events, or at his discretion, to wait for a market; and in the exercise of these powers, it becomes necessary to warehouse the goods; in such case the right to insure the goods against fire, if deemed advisable, results, by necessary implication, from the power to retain the goods in store, and the consequent hazard to which they are exposed. See Observations of Jones, C. J. 1 Hall. 114, 115.

The principle is well established, that a supercargo or consignee, who holds the bill of lading and invoices of the goods, in his own name, has an insurable interest in them. And yet he has no higher title to the goods than other consignees; for his powers are revocable, and his interest defeasible, by the principal, at pleasure; and other consignees have a title equally secure, and an interest equally absolute, as against all the world, except the consignor; and their special property can be divested by no other person. The sole difference is, that the one is in possession of written evidence of his title; the other may hold under a verbal transfer. In the case of *Buck and Hedrick* v. *The Chesapeake Ins. Co.* 1 Pet. R. 151, the Master to whom the goods were consigned, was held to have an insurable interest in them. Still he has no beneficial interest in the cargo, but is a mere supercargo or consignee clothed by the consignment, with the power to sell the goods, for the account and risk of the consignor. And if the fact of consignment confers the right, may not every consignee of goods, for sale, claim the same title, by virtue of his consignment? The consignment is, most generally, accompanied by the delivery of the bills of lading to the consignee; and where no bill of lading accompanies the goods, the delivery of them, with written or verbal authority to sell, must be tantamount. In each case, the consignee is virtually a trustee for the sale of the goods, and has, to all substantial purposes, the same special property in them, that vested in the master, by the consignment, in the case of *Buck* v. *The Chesapeake Ins. Company.*

Goods held in trust or on commission will not be covered by the policy,

unless insured as such, although the party may have a lien for advances. *Bricta* v. *N. Y. Lafayette Ins. Co.* 2 Hall, 372. But the words "goods held on commission in fire policies, are equivalent to the clause "for whom it may concern," usually inserted in marine policies. They contain a distinct declaration to the insurers, that the assured is acting for the benefit of his consignors: and that other interests, than his own, is to be protected by the policy. It surely is not necessary to the validity of such an insurance, for the factor to insert the names of his principals in the policy. Such a requisition would be embarrassing in the extreme, and often impracticable. It cannot be foreknown whose goods will be there. See observations of Ch. J. Jones and Mr. Justice Oakley, in *De Forest* v. *The Fulton F. Ins. Co. supra.*

(*c*) *The interest of carriers.*—A carrier may insure the goods he contracts to convey; yet he has neither the legal title, nor the beneficial interest in them, but he is responsible for their loss. His insurance is upon the goods; yet his indemnity is against the consequences of his implied guaranty for their safe carriage, and not against the loss or deterioration of the property by the perils insured against. By Jones, C. J. in 1 Hall, 110. So in *Oliver* v. *Green*, 3 Mass. 133, a part owner of a ship chartered the residue of her, with an agreement to pay a specific sum if she should be lost, and insured the whole ship as his own property, without stating the nature of his interest; and he recovered for the whole value of her, notwithstanding the objection of short interest was taken. So in *Bartlett* v. *Goodwin*, 13 Mass. 267, the charterer of a vessel who agreed to insure her, was held to have an insurable interest; and he recovered the actual value averring an interest in himself.

These may be said not to be apposite examples, as the charterer is deemed the owner of the ship for the voyage, But his title, at best, is but temporary, and terminates with the voyage. He has the use of the ship for the time the charter-party has to run; but he has not the right of property. The legal ownership continues in him who lets her to hire, and the insurable interest of the charterer, in the cases cited, consisted in his exposure to damage from his engagement to protect the owner from loss, against the consequences of which engagement, he insures for his indemnity. So, again, a creditor may insure the life of his debtor, because his debt would be put in greater jeopardy by the death of the debtor. And it has been held, that a creditor may insure the goods of his debtor, destined for the payment of his debt, though consigned to another person. Yet these insurances are, in effect, for the use of the debtor and enure to his benefit. And that objection was urged against the insurance effected by a creditor, to whom the bill of lading had been assigned; but it was held to be untenable. By Oakley, J. 1 Hall, 111.

A pawnee, depository or common carrier, may legally insure their respective interests, subject to the rules of the different offices by most of which the nature of the property insured is to be specified; "and it may be observed in general (adds Mr. Ellis, p. 22), that although the st. 14 Geo. 3. c. 48, has a tendency to throw considerable difficulties in the way of recovering upon a loss both on fire and life policies, by putting the claimant to the proof of his inter-

est, in order to entitle him to recover, the offices in general from a sense of liberality and the good faith due to the public, seldom avail themselves of this objection when the claim is even tolerably fair and honest. In fact, such would be the difficulty of ascertaining the precise quantum of interest in many cases, in order to comply with the third section of the act, that this clause would, if insisted on, materially affect the whole system of fire and life insurance, by making the sum to be paid upon the event happening, a constant subject of doubt and litigation." The words of the S. 3, are—"And in all cases, where the insured hath interest in such life or lives, *event or events, no greater sum* shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured on such life or lives, or other event or events."

(*d*) *Indorser of bill of lading.*—The consignor of goods for sale usually effects the insurance for himself on maritime risks, the consignee is not expected to insure the goods against maritime risks on the voyage of importation. By Jones, C. J. in 1 Hall, 120. The reason why the consignee does not insure in such cases, without an order from the consignor, is because the consignor being on the spot, is better capable of determining whether he will insure or not. And where the consignees make advances they insure for their own protection.

A bill of lading is transferable by the indorsement of the shipper or consignor. But if the shipper be the owner, and the ship be on his own account and risk, although he may not pass the title by a mere indorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet by an assignment, either on the bill of lading, or any separate instrument, he can pass the legal title to the same, and it will be good against all persons, except a purchaser for valuable consideration by the indorsement of the bill of lading itself. Such an assignment not only passes the legal title, as against his agents and factors, but also against his creditors, in favor of the assignee. The result of the principle is, that bills of lading are transferable by indorsement, and this may pass the property. By Story, J. in 4 Mason, 515. See also 18 J. R. 157.

Though the second vendee of a chattel cannot, generally speaking, stand in a better situation than his immediate vendor, *Small* v. *Moate*, 9 Bing, 574; *Dixon* v. *Yeates*, 5 B. & Ad. 313; but on this rule there is an exception engrafted, for the vendee may, by negotiating the bill of lading to a bona fide transferree, defeat the vendor's right to stop *in transitu*. It is now the admitted doctrine in our courts that the consignee, under the circumstances above stated, may confer an absolute right and property, upon a third person, indefeasible by any claim on the part of the consignor.

Fraud on the part of the assignee; for instance, if he know that the consignee is insolvent and take the assignment of the bill of lading for the purpose of defeating the right to stop *in transitu*, and so defrauding the consignor out of the price, he will be held to stand in the same situation as the consignee; and the consignor will preserve his right of stoppage. By Ld. El-

lenborough in 9 East, 514, and see *Jordan* v. *James*, 5 Ohio, 98. And if the bill of lading contain a condition, the endorsee takes it subject to that condition. 3 Camp. 92.

A factor stands in a different situation from a vendee with respect to his power to pass the property therein by an indorsement of the bill of lading. He might bind his principal by a sale of the property, but not by a pledge. By st. 4 G. 4. c. 83, amended by 6 G. 4. c. 94, usually called the Factor's Act, the law was altered. But a fraudulent sale cannot be upheld under this act. 1 M. & M. 48.

The goods are *in transitu* so long as they remain in any place of deposit connected with their transmission. 8 Pick. 198. If after their arrival, however, at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop *in transitu*. See 2 Bing. N. C. 83; 1 M. & Wels. 20; 6 B. & C. 422; ib. 109; 2 Tyrwh, 217. The true distinction is, whether any actual possession by the consignee or his assigns, after the termination of the voyage be, or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus if goods are consigned on credit, and delivered on board a ship chartered by the consignee to be imported by him, the right of stopping *in transitu* continues after the shipment, (3 East, 381;) but if the goods are not to be imported by the consignee, but to be transported to the place of shipment, to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided in the bills of lading, which express the terms of the shipment (7 T. R. 442.) By Parsons, C. J. in *Stubb* v. *Lund*, 7 Mass. 453.

The same rule must govern, if the consignee be the ship-owner. If the goods be delivered on board of his ship, to be carried to him, an actual possession by him after delivery is provided for by the terms of the shipment; but if the goods are put on board his ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bills of lading. In the former case the transit continues until the termination of the voyage; but in the latter case the transit ends on the shipment. Ib.

"The same distinction must exist in the case of a general ship.—If a ship sail from this country to Great Britain, with the intention of taking on board goods of divers persons on freight, to be transported to a foreign market, as the mercantile adventures of different shippers.—If goods are so shipped by the several consignors there is no *transit* to the consignees after shipment; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk, for a future actual possession by them is provided for in the bills of lading." Ib.

"An insolvent consignee may, before he receive the goods, disagree to the consignment, and the assent of the consignor shall be presumed unless he, in

a reasonable time, declare his dissent, or neglect to give notice of his assent. That he avail himself of this disagreement, the consignee should give reasonable notice thereof, and he must within a reasonable time declare his intention. For if, after notice he is silent, his assent shall no longer be presumed. If the goods arrive here before the consignor can have notice that his consignee had disagreed to the shipment, any person, at the request of the consignee, may receive and take care of them until the consignor can have notice; and an intermediate attachment shall not defeat his right. Per Parsons, C. J. in 5 Mass. 157. However, if the consignees here undertake to assign the goods, and authorize a sale thereof for the use of the consignor; this is in affirmance of the contract; and we cannot presume that the consignor would consent to the appointment of a factor, with power to receive and sell. The authority of the factor is derived from the consignee, and necessarily supposes an interest in the goods. Id.

Whether stoppage *in transitu* rescinds the contract of sale altogether, or only puts the vendor in possession of a lien on the goods defeasible on payment of the price agreed on, is still undetermined. See 10 B. & C. 99; 3 B. & Ad. 323.

In *Jordan* v. *James*, 5 Ohio, 98, it was held, that the vendor's right of stopping *in transitu*, was not founded on the right to rescind the contract, but rested on the ground of an equitable lien; and that the vendee had a right to redeem the goods on complying with the contract or paying the price.

(*e.*) *Of joint and several interests in the same policy.*—A factor or commission merchant who has the consignments of the merchandize of different employers, may cover the whole with one insurance, in the name of the consignee who has the actual possession and charge of the whole, and the same special property in all. The form of insurance now in use is, a general policy in the name of the commission merchant, on all the goods that may be in his warehouse, at any time within a given period, to a specified amount, whether held by him as owner, or in trust, or on commission. And under such a contract the insurers will be answerable for loss or damage by fire, within the terms of the insurance, to whatever merchandize or property may happen to be in the warehouse at the time of the fire, and be then held by the assured, as general or special owner, without regard to the time of his receipt of the goods in store, or the persons who may be interested in them. *De Forest* v. *The Fulton Fire Ins. Co.* 1 Hall, 84. A policy, thus made, cannot be considered as attaching specifically and solely, on the goods in the hands of the factor, at the date of the policy. The property of consignors is constantly changing, in the hands of the consignees; and it will and must often happen, that no part of the specific goods, originally covered by the policy, is exposed to loss, when any fire may take place. The goods of A., which occupy a place in his warehouse, at the present moment, may be sold before the close of the day, and the goods of B. take their place to-morrow; and in the course of thirty days, as many different lots of merchandize may have had the shelter of his warehouse, and been exposed for different periods of time, to the risk or loss or damage by fire therein. By Jones, C. J. ib.

Several insurable interests arise out of the same property. Where several are interested in the same subject, one may insure his interest without disclosing his title whether it be joint or several. Such an insurance is not within the clause, which requires notice to be given of any previous insurance. *Tyler* v. *Aetna Ins. Co.* 12 Wend. 507—9 ib. 404. See also the case of *Oliver* v. *Greene*, 3 Mass. 137. In the case of *Holbrook* v. *Brown*, 2 ib. 280, the captain of the vessel was entitled to certain commissions on her arrival and he effected an insurance on his "property in the vessel:" Held, that the word "property" was very comprehensive, and included the interest of the master, whether it was to be considered as commissions or as a specific proportion of the cargo belonging exclusively to him.

It is not now to be disputed, that several persons having several interests in property, may insure to the full value of that interest. There are numerous cases settling this point. By Parker, C. J. in *Locke* v. *North Amer. Ins. Co.*, 13 Mass. 61. But one tenant in common has no right, merely in virtue of such relation to cause insurance to be made on property on board of a vessel for his co-tenant. 11 Pick. 85. Nor has a master of a vessel a right merely as master to procure insurance for the owners. ib. and see 1 Conn. 571.

Where the insurance is on property for whom it may concern, or for the owners generally in a marine insurance, it may be shown by extrinsic evidence, that the plaintiffs intended that the policy should cover separate or joint property, or both. And even where the assured are not named in the policy, it is competent to prove who they are by extrinsic evidence. *Foster* v. *The United States Ins. Co.* 11 Pick. 85.

Joint owners of property insured for their joint use and on their joint account cannot recover upon a count upon the policy, averring the interest to be in one of them only, *Bell* v. *Ansley*, 16 East, 141. If the assured aver an entire interest in themselves in the subject insured, such averment cannot be supported by evidence of a joint interest with others. Nor can the averment of a joint interest with others be supported by proof a sole interest. By Thompson, J. in *Catlett* v. *Pacific Ins. Co.*, 1 Paine's C. R. 615; 1 Wend. 661. Where the insurance is made on the account of the others interested as well as himself, the joint interest should be truly averred, and proved as averred. *Murray* v. *Col. Ins. Co.*, 11 J[illegible]. 202. In the case of *Foster* v. *The United States Ins. Co.* 11 Pick. 85, G. B. & M. were joint owners of the vessel; G., who was master as well as owner wrote to the plaintiffs as follows:—"The property to ship home in Sampson, say $1000, you will insure at lowest rate on account of owners." The policy was in the name of the plaintiffs thus:—"Cause Foster and Thompson, *for* the owners of brig Sampson to be assured, lost or not lost, $1000 on property on board brig Sampson, at," &c. There were several counts in the declaration, but the averments in the second count corresponded precisely with the fact; and G. recovered not only the amount of his property on his sole account, but his interest also in the joint property. The Court say—"We consider the policy to be effected for whomsoever it might concern, being owners of the Sampson, and that those were words of description of the persons who were to be assured, compre-

hending one or more who were owners. And we think it is within the true meaning of the policy to ascertain the interest, as well as the persons who were the owners, by extrinsic evidence.

The fire policy limits its protection to those who are specially named in it. But it is also a contract of indemnity to the assured solely. It is the difference in the terms of the different contracts, that creates the difference in the nature and extent of the insurance:—" and I am not prepared to say, that the policy against the risk of fire, is not capable of as much latitude, as the policy against maratime risks." By Jones, C. J. in 1 Hall, 84.

If the assured has an interest in the entire thing, he may insure separately, and under a general averment of interest in the entire thing, he shall recover for the loss, in proportion to his interest proved upon the trial. *Murray* v. *Col. Ins. Co.* 11 J. R. 311. 312. And where the policy is a valued policy upon the whole ship, and the plaintiff owns but a moiety, he will recover only according to his interest proved upon the trial; although the valuation in the policy covers the real value of the ship. ib. The contract being one purely of indemnity, whether it be an *open* or a *valued* policy.

The plaintiff effected insurance "on his goods, stock in trade," &c; and it was held, that the policy covered goods in his stores bought on joint account and sold for the mutual profit of the insured and another person, the insured being in advance on the adventure:—Held also, that the insured being absolute owner of one half of the goods in the store, had an insurable interest in them as stock in trade, and also to cover his advances on the whole stock. *Millaudon* v. *Atlantic Ins. Co.* 8 Lou. R. 557.

In *Bell* v. *Humphreys*, 2 Stark. R. 345, there were five owners of a ship, and two of them, who were the managing owners or ship's husbands, procured insurance upon the whole vessel, and Lord Ellenborough held that they had no authority to insure the interest of the other three owners, and that the latter were not liable for the premiums of insurance. The case of *Lawrence* v. *Sebor*, 2 Caines, 203, was an insurance by one of two joint owners of the *cargo*, upon their joint interest therein; and the majority of the court held that the acting partner was bound to insure for both. Two of the judges, however, considered the insurance as effected only on the part owned by the former. If the insurance is effected by one of the owners *for account of the owners*, all interested in the ship may enforce the insurance; and although it be originally effected without authority by one of the part-owners, the other owners may confirm and ratify his doings and claim the benefit of the policy. *Turner* v. *Burrows*, 8 Wend. 144.

An assured part owner of a vessel may maintain an action of assumpsit for money had and received against an insurance broker, who has received from the underwriters the full amount of the sums subscribed on a total loss, although several other persons are interested as part-owners, who had given the defendant notice of their interest, where the plaintiff insured on the whole ship generally, through the intervention of his captain, who gave the order for effecting the insurance. *Roberts* v. *Ogilvy*, 9 Price, 269.

CHAPTER III.

THE NATURE AND EXTENT OF THE RISKS FOR WHICH THE INSURERS UNDERTAKE.

1. *What risks are in general within a policy:—and herein of barratry, negligence, &c.*

The property embarked in a marine adventure may be insured against all the numerous Risks and Perils to which it is exposed, except in some particular instances, where the insurance against certain risks is disallowed on principles of public policy, or excluded from the nature of the contract itself. Losses by perils of the sea, are those which happen from the sea, and are necessarily incidental to a ship engaged in a sea voyage; such as those occasioned by the winds and waves: by lightning, storms and tempest; by rocks, sands, and other natural causes. Hughes Insu. 213.

It is the proximate cause which must be regarded in considering whether a loss is to be ascribed to a particular peril or not. Thus, in *Hahn* v. *Corbett*, 2 *Bing. R.* 205, where there was a warranty from capture and seizure, when the ship was stranded on a shoal within a short distance from the port of destination, and lost; but while she lay disabled from proceeding she was seized by the commander of the place at which she was stranded, and the goods insured were confiscated by him, this was considered a loss by the perils of the sea. And a loss is properly ascribed to the perils of the sea, when they are the immediate and proximate cause of the loss, although another remote or intervening cause may have contributed to bring the ship into danger. As in the case of collision, where the ship insured is run down by another vessel, without any blame being imputable to either, (3 Esp. 67; 3 Taunt, 4, 5 S. C.; 5 M & S. 466,) or where the collision happens through the default of the other vessel, (4 Taunt. 126) or even from the neglect of the crew of the ship insured, the loss in each case seems to be properly ascribable to the perils of the sea; for although neglect and mismanagement may have contributed to bring the two ships into contact, the loss is immediately occasioned by the force of the winds and waves. Hughes Insu. 216. And in general, a loss occasioned by a peril of the sea is embraced by the terms of a policy, although it is remotely attributable to the negligence of the master and mariners; for although there is an implied warranty on the part of the insured to provide the ship in the first instance with a sufficient crew, yet the insured do not undertake for the conduct of the crew during the voyage. And therefore, where the ship grounded in consequence of the watch on duty having fallen asleep, this was considered as a loss by the perils of the sea, for which the underwriters were liable 5 B. A 171; 2 ib. 75.

Whether in a marine policy (and a policy on rivers and inlands waters may be so called) where the risk of fire is taken, and the risk of barratry is not, a loss by fire, remotely caused by negligence, is a loss within the policy?

"If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion, that a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy; unless there be some other language in it, which repels that conclusion." Per Story, J. in *Waters* v. *The Merchants' Louisville, Ins. Co*, 11 Pet. 213. The action was brought on a policy underwritten by defendants, whereby they insured and caused to be insured, the plaintiff "lost or not lost, in the sum of $6000, on the steamboat Lioness, engine, tackle, and furniture, to navigate the western waters usually navigated by steamboats, particularly from New Orleans to Natchitoches on Red River, or elsewhere, the Missouri and Upper Missouri excepted; (Captain Waters having the privilege of placing competent masters in command at any time, 6000 being insured at New Albany, Indiana) whereof William Waters is at present master; beginning the adventure upon the steamboat from the 12 Sep. 1832, at 12 o'clock meridian, and to continue and endure until the 12 Sep. 1833, at 12 o'clock, meridian. (12 months.) The policy further provided, that "It shall be lawful for the said Steamboat, during said time, to proceed to, touch and stay at, any point or points, place or places, if thereunto obliged by stress of weather or other unavoidable accidents, also at the usual landings for wood and refreshments, and for discharging freight and passengers, without prejudice to this insurance. Touching the adventure and perils, which the aforesaid insurance company is contended to bear; they are, of the rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes, which shall come to the hurt, detriment, or damage of the said steamboat, engine, tackle and furniture, according to the true intent and meaning of this policy." The premium was nine per cent. The declaration averred a total loss; and that the said steamboat and appurteances insured, "were, by the adventures and perils of fire and the river, exploded, sunk to the bottom of Red river aforesaid, and utterly destroyed."

It appeared that the boat was lost by the explosion of gunpowder, which she had on board at the time, and which she had received to transport; and the loss was occasioned by the unskillful, negligent and careless stowing away of the same in the boat, by the officers and crew, or some of them, so that the same took fire and became ignited, and the explosion thereby produced. The opinion of the court was certified thus. On consideration whereof, it is the opinion of this court, 1st, that the policy does not "cover a loss of the boat by a fire, caused by a barratry of the master and crew;" 2d, that the policy does "cover a loss of the boat by fire, caused by the negligence, carelessness or unskillfulness of the master and crew of the boat, or any of them;" 3d, that the allegations of the defendants in their pleas or either of them to the effect that the fire, by which the boat was lost, was caused by the carelessness, or the neglect, or unskillful conduct of the master and crew of the boat "is not a defence to this action; and 4thly, that the said pleas, or either of them, "are not sufficient in law as a bar to the action of the plaintiff." ib. p. 225.

The foregoing opinion was in answer to four questions.—"1. Does the policy cover a loss of the boat by a fire, caused by the barratry of the master and crew?" Mr. J. Story in delivering the opinion of the court upon this, observes:—"As we understand the first question, it assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents; or, in other words, that the fire was communicated and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say, that a loss by fire caused by the barratry of the master and crew, is not a loss within the policy. Such a loss is properly attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the sea or of rivers, though the flow of the water should co-operate in producing the sinking."

The second question seems to embrace the principal point in the case:—"whether a loss by fire, remotely caused by the negligence, carelessness, or unskillfulness of the master and crew of the vessel, is a loss within the true intent and meaning of the policy?—Upon this question he observes (p. 220. *et seq.)* "By unskillfulness, as here stated, we do not understand in this instance, a general unskilfullness, such as would be a breach of the implied warranty of competent skill to navigate and conduct the vessel; but only unskillfulness in the particular circumstances remotely connected with the loss. In this sense, it is equivalent to negligence or carelessness in the execution of duty, and not to incapacity."

"This question has undergone many discussions in England and America, and has given rise to opposing judgments in the two countries. As applied to policies against fire on land, the doctrine has for a great length of time prevailed, that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies; and as such recoverable from the underwriters. It is not certain upon what precise grounds this doctrine was originally settled. It may have been from the rule of interpretation applied to such policies containing special exceptions, and not excepting this; or it may have been, and more probably was founded upon a more general ground, that as the terms of the policy covered risks by fire generally, no exception ought to be introduced by construction, except that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied. It is probable, too, that the consideration had great weight, that otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, neglect, or inattention of the members of the family.

"Be the origin of it, however, what it may, the doctrine is now firmly established both in England and America. We had occasion to consider and decide the point at the last term, in the case of the *Columbia Ins. Co.* of *Alex-*

andria v. *Lawrence*, 10 Pet. B. 517, 518; which was a policy against the risk of fire on land. The argument addressed to us, on that occasion, endeavored to establish the proposition, that there was no real distinction, between policies against fire on land and at sea; and that in each case the same risks were included: and that as the risk of loss by fire occasioned by negligence was not included in a marine policy, unless that of barratry was also contained in the same policy, it followed, that as the latter risk was not taken on a land policy, no recovery could be had. In reply to that argument, the court, Story J. said. —"In relation to insurances against fire on land, the doctrine seems to have prevailed, for a great length of time, that they cover losses occasioned by the mere faults and negligence of the assured and his servants, unaffected by any fraud or design. In the arguments of counsel on marine policies, it has constantly been taken for granted, both in England and America: (see *Busk* v. *Royal Exch. Ins. Co.* 2 B. & Ald. 82; and *Grim* v. the *Phœnix Ins. Co.* Co. 13 J. R. 451) and although there is no case directly on the point decided by the highest authority; yet, Lord Ch. J. Gibbs. at N. P. held, that if a servant by negligence sets an house on fire, the loss is recoverable on a policy against fire." In *Busk* v. *Royal Exch. Co.* 2. B. & Ald. 79, Mr. J. Bayley, observes: —"The policy expressly throws upon the underwriters the liability of all losses proceeding from fire, barratry of the master and mariners, and all other perils, losses and misfortunes, that should come to the hurt, and detriment or damage of the ship." The object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable *prima facie* by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners?" In that case the policy also included the risk of barratry; and it was held, that in an action on a policy on ship, by which amongst other risks, the underwriters insured against fire, and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners. However, after citing and commenting upon writers of authority in other countries, the learned judge concludes by saying:—"The fair result, therefore of all these authorities, is this, that the underwriters are liable for a loss by fire, occasioned by the negligence of the master and mariners, provided they insure against barratry, that term being, in the French writers, used in its largest sense, as comprehending negligence as well as wilful misconduct; but, inasmuch as the term barratry is used in our policies in a more limited sense, as applicable only to the wilful misconduct of the master or mariners, the authority of *emerigon* affords no ground for our decision in this case. We must, therefore endeavor to collect the meaning of the contracting parties, from the terms of the policy itself, and in considering whether the assured claiming for a loss by fire, is to have that claim disallowed, on the ground that the fire was occasioned by the misconduct of the master, we must look to the other terms of the policy, and learn from them, whether the assurers, in other instances, are responsible for the misconduct of the master; and when we find that they make themselves answerable for the wilful misconduct of the master in other

cases, it is not too much to say that they meant to indemnify the assured against fire, proceeding from the negligence of the master and mariners." In *Walker* v. *Maitland*, 5 B. & Ald. 171, the underwriters were held liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners: Abbott C. J. saying:—"I can not distinguish this case from *Busk* v. *The Royal Exch. Assurance Co. (supra.)*; there the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew." In *Bishop* v. *Pentland*, 7 B. & C. 219, Mr. J. Bayley, said—"The cases of *Busk* v. *The Royal Assurance Co. and Walker* v. *Maitland*, establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners."

In *The Petapsco Ins. Co.* v. *Coulter*, 3 Pet. R. 222, where the loss was by fire, and barratry also was insured against: Held, that in such a policy, a loss which was remotely caused by the master or the crew, was a risk taken in the policy; and the doctrine in the English cases was recognized and approved. Mr. Justice Story observes (in *Waters* v. *The Louisville Ins. Co., supra*):—"It is true that the Court (in *The Petapsco Ins. Co.* v. *Coulter*,) lay great stress on the fact that barratry was insured against; but it may also be stated that this ground was not exclusively relied on, for the court expressly refer to and adopt the doctrine of the English cases, that the proximate and not the remote cause of a loss is to be looked to. It is known to those of us who constituted a part of the court at that time, that a majority of the judges were then of opinion for the plaintiff, upon this last general ground, independently of the other." He adds:—"It was under these circumstances, that the case of *The Columbian Ins. Co. of Alexandria*, v. *Lawrence*, 10 Pet. R. 507, came on for argument: and the Court then thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy; notwithstanding it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion; and on the contrary, upon the present argument, we are confirmed in it."

The learned Judge in concluding his elaborate opinion, (in *Waters* v. *The Merchants' Louisville Ins. Co. supra,*) observes:—"Some suggestion was made at the bar, whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of opinion, that as the explosion was caused by fire, the latter was the proximate cause of the loss." The fifth plea in that case turned upon the ground, that the taking of gunpowder on board was an increase of the risk: And the same judge remarked:—"If the taking of the gunpowder on board was not justified by the usage of the trade, and therefore was not contemplated as a risk by the policy; there might be great reason to contend, that if it increased the risk, the loss was not covered by the policy.

But in our opinion the facts are too defectively stated in the fifth plea to raise the question."

Where a policy against fire stipulates that the company will make good any loss or damage "by fire, originating in any cause, except design in the assured, &c: *Held*, that the company in such case make themselves liable for losses by negligence, as well as by accident; for the exception of losses by design admits all losses not by design. *Catlin* v. *The Springfield Fire Ins. Co.* 1 Sumner, 434. The English decisions clearly are, that, on policies against fire generally, losses by the negligence of tenants are within the risks taken. And it is still more clear, that losses by the negligence of tenants, or by the criminal wantonness, or misconduct of mere trespassers, or intruders, or felons are within the common policies against fire. Per Story, J. in ib. The loss, to be by design of the assured, in the sense of the policy, must be by incitement, connivance, or co-operation of the assured, directly or indirectly, with the persons, who were the agents in the act. ib.

In a marine policy, which insures against the *barratry* of the master and crew:—Held, that insurers were liable, although it appeared that the vessel was lost in consequence of the Master's pursuing an *illicit trade* by *smuggling*; and although a *warranty* was inserted in the policy against *illicit or prohibited trade*. *American Ins. Co.* v. *Durham*, 15 Wend. 9; 12 ib. 463 S. C. The leading case upon this subject in N. Y. is *Suckley* v. *Delafield*, 2 Caines' Cas. 222; *Smith* v. *Del. Ins. Co.* 3 S. & R. 82. See *Wilcox* v. *The Union Ins. Co.* 2 Binn. 579; *Brown* v. *The Union Ins. Co.* 5 Day, 1. The clause of warranty of the assured does not interfere with or alter the clause of insurance against the barratry of the master.

Where in an action against an insurance company to recover a loss sustained by fire, the defence was, that the plaintiff had wilfully set fire to the premises, and the judge directed the jury, that, in order to find a verdict against the plaintiff, they should be satisfied that the crime imputed to him was as fully and satisfactorily proved as would warrant them in finding him guilty on a criminal charge for the same offence:—Held, that such direction was right. *Thurtell* v. *Beaumont*, 8 Moore, 612; 1 Bing. 339.

Neither a loss of the outward cargo destroyed by fire on shore at the foreign port, nor damage to the vessel by worms and climate, nor an extraordinary expenditure of provisions, whether by the seamen, or by sentinels placed on board by the government, nor the possible earnings of a vessel during an embargo, are losses within a policy of insurance against the usual risks, on a vessel and cargo *to, at and from* a foreign port, for the purpose of *selling the outward, and purchasing a return cargo*. *Martin* v. *Salem M. Ins. Co.*, 2 Mass. 420, 427. The Court says:—"If the words in this instrument, descriptive of the subject matter of the insurance, and of the duration of the risk, had been in the usual form of English policies, and instead of the *cargo*, the description had been *goods laden on board the said Schooner, from the loading aboard, and to continue until the same be discharged and safely landed*, it would hardly be pretended that goods landed from the vessel, or goods prepared to be put on

board, but lost by the burning of a dwelling house or warehouse on the shore, were within the words of the policy. Accordingly the general rule of construction in English policies is, that the risk on goods continues no longer than they are actually on board the ship mentioned in the policy."

The insurers must be intended to have known the course of business and the usage of trade in a manufacturing establishment insured. In *Delonguemare* v. *The Tradesmen's Ins. Co.* 2 Hall, 589, the policy was in the usual form, insuring the plaintiff, for the term of one year, upon the building composing his china or porcelain manufactory, and on the machinery, tools, horses, and stock, finished and unfinished, contained therein. It was objected, that a carpenter's shop was permitted on the premises, up to the time of the fire, without license or consent of the insurers, and against the express provisions of the policy, whereby the contract of insurance was avoided or suspended. It appeared that one room, at the time the policy was effected, did contain a carpenter's work bench and tools, and that a carpenter was constantly at work there, in making moulds and boxes, and in putting up shelves for the use of the establishment, from the date of the policy to the day preceding the fire, and that the apartment had not at any time been used as a store for painted ware.

The plaintiff insisted that a carpenter was a necessary workman to be attached to the establishment, and that his employment and accommodation in the buildings insured, were justified by the ordinary requirements of the manufactory, and by the usage of the trade, and he denied that such use and occupation of the store-room, by a workman attached to the establishment, was prohibited by the policy, or that he was bound to disclose the circumstance to the insurers, or that his silence in respect to it amounted to deception, or a culpable concealment or misrepresentation in the description he gave of the property and the purposes to which it was applied. Witnesses were called by him to prove that a carpenter was a necessary workman for him to employ in his manufactory, and that such a workman is usually attached to such manufactories, and at all times employed therein.

The agreement and provision of the policy to which the objection refers, is in substance as follows; that is to say, "that in case the buildings should at any time after the making of the policy, and during the time it would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on, or exercising therein any trade, business, or vocation, denominated hazardous or extra-hazardous, as specified in the memorandum of special rates in the proposals annexed to the policy, unless in the policy otherwise specially provided for, or thereafter agreed to by the corporation in writing, to be added to or endorsed upon the policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, those presents should cease, and be of no force or effect." And in the memorandum of special rates in the proposals attached to the policy, carpenters, in their own shops, are classed among the trades and occupations deemed extra-hazardous, and for the insurance upon which, an extra premium is to be charged. The defendants insisted, that the occupation of the store-room in the building,

by the carpenter for his shop, was conclusive evidence of the fact, that it was used for the purpose of exercising therein an extra-hazardous trade or vocation within the meaning of the prohibitory clause or provision of the policy, without the assent of the corporation, and therefore caused a suspension of the policy, which continued until and at the time of the fire.

Mr. Justice Oakley overruled these objections at the trial; and the Court upon consideration refused a new trial. Ch. J. Jones observes:—"All the witnesses who testify to the point, concur in the opinion that a carpenter is a necessary workman in such establishments.—This proof of the necessity of a carpenter, and of the usage of manufacturers to employ and keep one as an ordinary workman in such an establishment, is not contradicted, and if it was admissable evidence, of which no question is made, it must, we think, be sufficient to take the plaintiff's case out of the operation of the prohibitory clause or provision of the policy, and justify the assured in the use he permitted of the store-room in question; for one carpenter only was retained by him, and continued in his employ in the factory at the time of the fire. Such a workman was required for the ordinary purposes of the manufactory, and he must have a place to work in.

The restriction inhibiting the appropriation of the building to extra-hazardous trades, on the pain of the suspension of the obligation of the insurers, was considered inapplicable to a trade or vocation, however hazardous, appertaining, or usually attached to an establishment, which the underwriters, with a description of it before them, agreed to insure; such an occupation forms a prominent object of the insurance, and without which, the establishment cannot be profitably carried on. ib. And, however unwarrantable the use made of the buildings by the workmen might have been, the contract of insurance, by the terms of it, could be suspended during the continuance only of such unauthorised use of them. ib.

2. *Damage by heat in the process of manufacture without ignition.*

To found a valid claim under the policy, a loss or damage by fire must occur; for *it seems* that loss or damage by *heat* alone, without ignition, is not covered by the usual policy, against loss by fire.

The insurers, in consideration of the premium paid, usually undertake to pay or make good to the insured, his executors, administrators or assigns, all such loss or damage as shall happen by fire, (except loss or damage by fire happening by any *invasion, foreign enemy, civil commotion* or *riot*, or any *military* or *usurped power* whatever,) to the property specified, to the extent of the sum for which it is insured, but they sometimes also give notice, by the indorsements of the policy, that they will not be answerable for loss or damage on stock of any kind *occasioned* by the *misapplication of fire heat under process of manufacture*, or for loss or damage to hay or corn, or stock of any kind, occasioned by its own natural heating. It is obvious that to indemnify the insured against ignition under either of these circumstances, would be to open a door to negligence and fraud, if not directly to encourage it. On the other

hand, to remove any doubt in the minds of the insured, though little could exist upon the terms of most policies, it is sometimes expressly stated that losses occasioned by fire from lightning will be made good. (Ellis, p. 15.)

1. In order to recover upon a policy against loss or damage *by fire*, it is not sufficient to show that the property has been damaged by the *heat* of fires usually employed in the manufacture, and increased by the negligence of the insured, or his servants, beyond its usual intensity.

In *Austen* v. *Drew*, 6 Taunt, 436, the action was on a policy effected "against all the damage which the plaintiffs should suffer *by fire*" on their "stock and utensils in their regular built sugar-house," and plaintiffs averred that their "stock and utensils were very much damaged by fire in the sugar-house." The defendants pleaded that the stock and utensils were, through the negligence and improper conduct of the plaintiffs and their servants in managing the fires usually employed in the sugar-house, damaged by the smoke arising from such fires, and not from any other cause, and traversed the damage by fire. It appeared that the building insured contained eight stories, and in each story sugar, in a certain state of preparation, was deposited for the purpose of being refined; in order for refining, a certain degree of heat was necessary, and a chimney, running through the whole building, formed almost one side of one of the stories, and by means of this chimney, heat was communicated to each of the stories. At the top of the chimney, above the eight stories, was a regulator, which the plaintiff used to shut up at night, in order to retain in the chimney and building all the heat they could. They shut it one night, and lighted the fires the next day, and they soon afterwards found the building full of smoke and sparks; and it was found that the regulator, which always ought to be open when the fire was burning, was continued shut down. There was much smoke, but the only injury done to the sugars proceeded from heat; nothing *was on fire* that ought not to be on fire; the damage was occasioned by the sparks, heat and smoke taking a wrong direction. Gibbs, C. J., directed the Jury, that inasmuch as the damage was occasioned entirely by the increased heat which was produced by keeping the regulator closed, it was not a loss by fire within the meaning of the policy, but was occasioned by the improper management of the regulator. The Jury found a verdict for the defendants;—and upon a motion for a new trial, on the ground that the words of the policy were "damage by fire," not "excess of fire," or "improper fire." Shepherd, Sol. Gen., said, if flame caused the mischief, it mattered not whether the fire was properly or improperly lighted, the question was, whether fire occasioned the damage. It could not be necessary that the fire, to produce a loss within the policy, should be only fire as was communicated to some substance not contained in the proper receptacle of fire. Suppose the intensity of heat necessarily required should be so great that the fire made in a chimney, though confined there, might ignite neighboring bodies, it might in that case as well be said that it was not a damage by fire. Put the case of a chimney on fire, there is only the usual quantity of heat below, but the mischief is occasioned by an accumulation of soot in the chimney, yet the insurers would be bound to pay any loss thereby occasioned. Gibbs, C. J.—I think

it is not necessary to determine any of those extreme questions. In the present case I think no loss was sustained by any of the risks in the policy—the loss was occasioned by the extreme mismanagement by the plaintiffs of their regulator. I have no reason to alter my opinion. Dallas, J. was of the same opinion, and the rule was refused.

Upon this decision Mr. Ellis (p. 27,) observes—It does not appear whether the proposals of the policy in this case protected the insurers from making good any loss or damage occasioned by the *misapplication of fire heat under process of manufacture.* It probably did not, or it otherwise would have been made a strong point for the defendants. It may be inferred, therefore, from this case, that damage by *heat* alone, without *ignition*, even where there is no express provision, is not covered by the ordinary indemnity against loss or damage by *fire*, and a fortiori, where this provision is introduced, and the *misapplication of fire heat* occasioned by ignition, the insurers will not be liable.

The policy was on premises "where no fire is kept, and where no hazardous goods are deposited. Held, that these words mean the habitual use of fire and deposit of hazardous goods; and therefore, where the fire happened in consequence of making a fire, and bringing a tar-barrel on to the premises to repair them:—Held, that the insured were entitled to recover." *Dobson* v. *Southby*, M. and M. 90.—Tenderden.

In the case of a freight policy, the underwriters were held not liable for the loss of freight, in consequence of part of the goods *being left behind by the captain*, on account of their being so damaged in a storm that they are liable to ignition, and that, to enable him to carry them forward, a process must be undergone, and the ship detained, at an expense which would be equal to the amount of the freight. *Moody* v *Jones*, 4 B. & Cr. 394.

If goods are put on board the ship in a very damaged state, in consequence of which they are liable to ignite and generate a fire, by which they are consumed, the underwriters are not liable for the loss. *Boyd* v. *Dubois*, 3 Camp. 133. The underwriters are not discharged by the circumstance of the goods having been damaged, or by the non-communication of that fact to the underwriters: but if in consequence of the damage which the goods have previously received, they consume themselves, the underwriters are not liable for the loss.

3. *Insurance of specific articles to be construed by the general scope of the policy.*

The meaning of the terms used in a policy will vary, according to the business to which they are applied. The plaintiff, a Coach-plater and Cow-keeper, insured his "stock in trade, household furniture, *linen*, wearing apparel, and plate," against fire for one year. Upon a fire happening within the year; and consuming, amongst other things, a large stock of *linen drapery* goods which he had purchased a short time before on speculation, and which, it was, contended, were protected by the policy under the denomination of "linen"—Lord Ellenborough held, that the word *linen* in the policy, evidently meaning, from the terms with which it was accompanied, household linen, or linen

used by way of apparel; and consequently did not protect the linen drapery goods on speculation:—the party insured not being a linen draper. *Watchorne* v. *Langford and others*, 3 Camp. 422. So, in *Moadinger* v. *The Mechanic's Fire Ins. Co. of the City of N. Y.* 2 Hall, 490, the plaintiff effected an insurance on "his stock in trade, as a *baker*, and on household furniture, contained in a framed dwelling-house and bake-house, front and rear, situated at No. 17 Thames street." It was insisted by the plaintiff that the terms "stock in trade" covered not only the flour used by him in his bake-house, but also all the implements and fixtures belonging to his business. The judge instructed the jury, that the terms *stock in trade*, when applied to a baker's property, must be intended to mean something more, than when used among merchants, from whom they were borrowed, and to whose business they were originally applicable. The terms when used in a policy, to designate the property of a mechanic, must be taken to mean whatever was necessary for the conducting of his business; and in the case then before the Court, not merely the flour used for baking. *Moadinger* v. *The Mechanic's F. Ins. Co.*, 2 Hall, 490. The plaintiff was a baker, carrying on business in a limited way. On the day of the fire, his whole stock of *bread* was upon his cart, and he contended, that in order to give effect to the intention of the parties, his fixtures and implements of business, must be considered as covered by the terms "stock in trade" as used in the policy; and of this opinion was the Court saying:—"We think the policy protected every thing which was necessary for carrying on of the plaintiff's business; and such ought to be the construction in all cases relating to the pursuits of mechanics—A mechanic who insures his stock, covers his implements of trade also. ib. The stock of a merchant comprehends articles entirely different from the stock of a farmer; but the terms in all cases, apply to personal property only. ib.

The insurance also was "on household furniture," and the plaintiff claimed to recover for the loss of five portraits, with their frames, twelve silver tablespoons, twelve tea-spoons, and a silver sugar-tongs. Defendants objected, because the 8th condition annexed to the policy provided that "jewels, plate, &c. should not be included in any insurance, unless specified in the policy." But the Chief Justice charged the Jury, "that although plate and paintings" were not covered by the policy, unless specified, yet he doubted, whether the condition could be applied to the portraits, or silver spoons specified in the plaintiff's schedule; and he accordingly instructed the jury to consider them as covered by the policy. Upon exception taken, Held, that the charge of the Judge was correct. ib.

The stock of a baker "contained in a framed dwelling-house and bake-house, front and rear, situated at No. 17 Thames st." Thirty barrels of flour, were stored under a *shed* which led from the bake-house to the front house, and the judge instructed the jury that the plaintiff was not entitled to recover for the flour thus stored. *Moadinger* v. *The Mechanic's Fire Ins. Co.* 2 Hall, 490.

4. *Commencement and Duration of the Contract.*

In general the risk commences from the signing of the policy, the payment of the premium, or of a deposite on account thereof; and it will in general end with the term for which it is made. In England insurances against fire are in general either annual, or for a term of seven years, at an annual premium; and the offices as an indulgence to the assured, generally allow fifteen days from the expiration of each year; and the assured is considered under the protection of the policy till the expiration of the fifteen days, provided the premium be paid within that time. Ellis, p. 49.

The plaintiffs stipulated to pay £7 10*s.* half-yearly on the 10th day of June and the 10th day of December, and that they would, as long as the managers *agreed to accept the same*, make their payments within the 15 days after the time limited; *but no insurance is to take place until the premium be actually paid.* The continuation of the term, therefore, depends on two circumstances, which may both concur, namely, that the insured should pay the £7 10*s.* and that the insurers should agree to accept that sum. Barely stating these facts is sufficient to show that the plaintiffs are not entitled to recover." The judgment was afterwards affirmed in the Exchequer Chamber. See Hughes on Ins. 508.

Soon after this decision the Royal Exchange Assu. Co., the Phœnix, and some other companies, gave notice that they did not mean to take advantage of the judgment so pronounced, but would hold themselves liable for any loss during the 15 days which are allowed for the payment of the renewed premium upon annual policies, and others for a longer period, but that every policy for a shorter period than a year would cease at six o'clock in the evening of the day mentioned therein. Ib. By a policy under seal referring to certain printed proposals, a fire office insured the defendant's premises from the 11th of November, 1802, to the 25th December, 1803, for a certain premium, which was to be paid yearly on each 25th of December; and the insurance was to continue so long as the insured should pay the premium at the said times and the office should agree to accept it. And by the printed proposals, it was stipulated that the insured should make all future payments annually at the office within fifteen days after the day limited by the policy, on pain of forfeiting the benefit thereof, and that no insurance was to take effect till the premium was paid. And by a subsequent advertisement (agreed to be taken as part of the policy) the office engaged that all persons insured there, by policies for a year or more, had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies. Notwithstanding this latter clause, the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured had refused; the office was held not liable for a loss which had happened within fifteen days from the expiration of the year for which the assurance was made; though the assured, after the loss, and before the fifteen days expired, tendered the the full premium which had been demanded. The effect of the whole contract taken to

gether, was only to give the assured an option to continue the insurance or not during fifteen days after the expiration of the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract. *Salvin and Others* v. *Jones and Others*, 6 East, 571.

A covenant in the lease of a house to insure, and keep insured, a given sum of money upon the premises, during the term, in some sufficient insurance office, is not void for uncertainty, but means that the premises shall be insured against fire, in some office where insurances against fire are usually effected. Where there was such a covenant in a lease on the part of the tenant, he effected an annual policy on the premises with an insurance company, in the usual printed form, by which it was declared that the policy shall be for such longer period as the tenant shall regularly pay, and the company receive the premium, during which the company was to be liable. The policy expired on the 25th of March, 1811; but the tenant did not pay the premium for a renewal until the 25th of April following; the company then gave a receipt for the premium, stating the insurance to be from Lady-day, 1811, till Lady-day, 1812. Here the covenant was ruled to have been broken, by reason of the non-payment of the premium on or before the 9th of April, and the lease was held void under a clause of re-entry, *Doe d. Pitt* v. *Shewen*, 3 Campb. 134. Lord Ellenborough C. J. in this case said, "that it may admit of considerable doubt, whether by the revenue laws the policy could be lawfully renewed by the payment of the premium after the end of the fifteen days. At any rate its existence was suspended from the 9th to the 25th of April, the covenant to insure was therefore broken, and the landlord was entitled to recover at law, whatever relief there might be for the tenant in equity." On the 19th of January, defendants applied for insurance by letter desiring to be informed in regard to the terms of insurance. The office replied on the 21st of the same month stating the terms. And on the 22d the defendants again wrote the plaintiffs thus—"We have received yours of the 21st instant and accept your terms for the stock in the Gleaner and wish a policy filled, viz. on 26 horses, valued at $2200, and on 20 oxen valued at $800=$3000." It was held, that no contract was perfected, because the first two letters were conversant about an open policy, while that of the 22d, requested a valued policy. This was a new proposal, which the defendants might presume the underwriters would accept, but they could not know it. The office had assumed no such obligation. The policy transmitted, was not conformable to the proposition; and there having been no union of minds between the parties, the Court decided, of consequence, that there was no contract; and the note given for the premium in suit was not recoverable. *Ocean Ins. Co.* v. *Carrington*, 3 Conn. 225.

The contract must be complete; otherwise the company shall not be liable to pay any loss. Therefore where the plaintiff applied for insurance, and the defendants prepared an application and a note for the premium dated the 16th January, which was sent to the plaintiff to be signed and returned by mail. He signed the application on the 28th of January and returned the same by mail together with the premium note to his agent on the 28th of the same

month. The House was burnt on the 31st of January, but the papers were not sent to the office until the 3d of the ensuing month. Held, that at the time when the fire took place, there was no complete contract of insurance between the parties, but only a negotiation which had not resulted in a contract. *Thayer* v. *Middlesex Mutual F. Ins. Co.* 10 Pick. 326.

It is settled, that a policy of insurance on a voyage from a particular part to a specified port or ports, and until moored 24 hours in safety, against the usual risks, has the effect to prolong the time for which the assurers have engaged to be liable, without varying the nature of the perils insured against. If without this clause the vessel be insured to her port of destination, the voyage is determined on her arrival and being moored on the usual anchorage ground; but with this clause the policy is further extended twenty-four hours. If therefore no loss, for which the underwriters are answerable, shall happen during the voyage, or during twenty-four hours after, they are discharged. And the vessel is safe within the terms of the policy, until she suffers a loss insured against. *Bill et al.* v. *Mason*, 6 Mass. 313. This construction seems necessary to give some termination to the risk; for if it was held that the vessel was not moored in safety while she is in hazard of a loss, she never can be moored in safety; for in the finest weather she may be in danger of fire, lightning, enemies and other perils, if not exposed to any sea risks.

5. *Effect of notice by an Office to determine a contract, except upon payment of a higher premium, and of the time allowed for the payment of premiums.*

After notice by the Sun Fire Office under the following circumstances to determine a contract, except upon payment of a higher premium, and refusal on the part of the insured to pay such premium, the insured were held to be protected by the policy during the fifteen days allowed by the Office for the payment of the premium, &c. for the following year.

The allowance of the fifteen days is to be considered as forming part of the period covered by the policy for the following year, but, in order to discharge the Office of liability during that period, there must be notice to determine the contract.

Where the insurance company reserves to itself the right to refuse to renew the policy, unless upon payment of a higher premium, the assured has an option to continue the insurance or not during the time mentioned for the payment thereof. If the assured refuse to accept the increased rate of premium, the company will not be liable for a loss; though the assured, after the loss, and before the time specified for the payment of the premium has expired, tender the full premium demanded. He shall not have a right to revoke his refusal after a loss has happened and thereby claim to recover for what he had previously determined he would not be insured. *Salvin* v. *Jones*, 6 East. 571.

It is made a condition with most Offices, that persons insuring property should give notice of any other insurance made elsewhere on the same property on their behalf, and cause a minute or memorandum of such other insurance to be endorsed on their policies; and in this case the company is only

liable to the rateable proportion of any loss or damage which may be sustained, and unless such notice be given, the insured are not to be entitled to any benefit under the policy. Ellis p. 23.

According to the general principles of insurance, whenever the risk to be run is *entire*, there is no return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire which generally are made for one entire and connected portion of time, which cannot be severed; and therefore if the property insured should be destroyed by fire, arising from the act of a *foreign enemy*, the very day after the commencement of the policy, though the underwriters would be discharged, yet there can be no apportionment or return of premium. Park, C. 23; 2 Marsh 652.

Even if the insured have no interest, yet it would appear that he cannot recover back the premium after taking the *chance* of a loss, and of obtaining from the generosity of the insurers the sum insured. *Lourieu* v. *Bordieu*, Dougl. 468.

6. *A nominal misdescription and the necessary introduction of fire into a building, covered by the common insurance.*

Where the misdescription is merely nominal, but is substantially correct, it will not vitiate the policy, and the introduction of a tar-barrel and fire for the necessary purpose of tarring the building, in consequence of which it was consumed by fire, will not vitiate the policy, though the premium was paid as for a building wherein no fire was kept, and no hazardous goods deposited.

In *Dobson* v. *Sotheby*, 1 Moo. & M. 96, an action of assumpsit was brought upon a policy of insurance against the defendants, three of the directors of the Beacon Insurance Company. The policy was effected upon "a barn, situate in an open field, lumber-built, and tiled." The conditions endorsed on the policy required the usual description of the property. The policy was effected at the lowest rate of premium, such as is only payable for buildings of a certain description, where no fire is kept, and no hazardous goods deposited. There were articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso, that "if buildings of any description insured with the company shall at any time after such insurance be made use of to stow or ware-house any hazardous goods" without leave from the company, the policy should be forfeited. The premises were agricultural buildings, but not such as were strictly to be described as a *barn*, but they were of such a nature that they would have been insured by the company at the same rate, if they had been more accurately described. They required tarring, and a fire was consequently lighted in the ware-house, and a tar-barrel was brought into the building for the purpose of performing the necessary operation. In the absence, and by the negligence of the plaintiff's servant, the tar boiled over, took fire, and communicated with that in the barrel, and the premises were burnt down.

It was contended that the plaintiff could not recover, 1st, because the premises were incorrectly described as a barn; 2d, because the lighting a fire was a contravention of the terms of the policy, which required that no fire should be kept in buildings on which the rate of insurance in the present case was paid; 3d, that the tar-barrel came under the description of hazardous goods, which was a breach of the condition.

Lord Tenderden, C. J.—If the property insured has not been correctly described, the defendants certainly are not liable; but I do not think that there is in this case any misdescription which will discharge them. The word "barn" is not the most correct description of the premises, but it would give the company substantial information of their nature; there would be no difference in their risk, and the insurance would have been at the same rate; whether the word "barn" or a more correct phrase had been used, I think therefore that they are substantially well described. Nor do I think that the circumstances relied on furnish any answer to the action. If the company intended to stipulate, not merely that no fire should habitually be kept on the same premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the *habitual* use of fire or the *ordinary* deposite of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen. I cannot therefore be of opinion, that the policy in this case was forfeited; and certainly if it is valid, the circumstance that the fire happened through the negligence of the plaintiff's servant furnishes no answer to the action. See *Austin* v. *Drew*, 6 Taunt, 436; 1 Holt's N. P. C. 126.

It appears that a coffee-house is not an inn within the meaning of a policy, enumerating the trade of an inn-keeper amongst others as doubly hazardous. *Doe d. Pitt* v. *Laing*, 4 Campb. 76.

CHAPTER IV.

OF INSURANCE AGENTS.

1. *Of the Agents for the Office.*

2. *Of the Agents for the Assured.*

1. Upon the payment of a deposit at the head office or to the respective agents, the office usually hold themselves liable for any loss by fire which may take place between the payment of the deposit and the making out the policy; and the slip, or memorandum of agreement usually delivered at the time of applying to insure, specifies the heads of the contract afterwards to be carried into effect. The powers of the agents, however, differ according to the rule of the different offices. In general, the agents are restricted from definitively undertaking that a policy shall be granted where large amounts are to be insured, or circumstances of doubt or difficulty are involved; and where the agents are not authorised to bind the company, the slip or memorandum should be accompanied with a proviso to that effect. Ellis, p. 78.

The general rule of principal and agent will apply, where no special regulations are made. ib.

One may become an agent of an incorporated company in the same manner as he may of an individual, without any deed or writing. *Perkins* v. *Washington Ins. Co.* 4 Cowen, 645. Here, the authority to bind the company seems to have been implied. The insured paid the premium to a person by the name of Russell for the purpose of insuring a specified sum on his stock of goods, in the city of Savannah; and Russell signed a receipt, describing himself as the agent of the company, and acknowledging also the receipt of fifty cents for the expense of the policy, and three dollars for the survey, &c. Six days after this the goods were consumed by fire. The principal question was as to the authority of Russell to bind the company. It was admitted that Russell had been previously appointed surveyor, but with no other powers. It appeared, that Russell had previously published in the papers in Savannah the proposals of the company; and added that insurance might be effected on application to him; and that he could obtain policies from the office with the least possible delay. It appeared also, that Russell previously to the receipt of the premium in this case had agreed to insure for a number of individuals, and received the premiums, which were sent to the company in New York; and that in every instance, save one, the company confirmed the insurance, and transmitted policies bearing date at the time the receipt

was given to the applicant for insurance. It also appeared that Russell applied to the company for an enlargement of his powers as agent. The Secretary in reply to his letter observes, that the company could obviate the difficulty, "as far as consistent with the principle they had adopted, which was that no insurance shall be binding, until the premium is received at the office in New York":—and as a reason for the rule he adds that the company would not be responsible, "for the risk of the sending the premium either by land or water," and that in all cases where the risk is accepted, the policy is to take effect from the time when the premium was received by the agent. Before the receipt of the premium by the agent in the present case, the president of the company confirms that of the secretary, adding:—"so that in case of accident between such time of payment, and the receipt of the money here, the company will indemnify such loss; provided, however, the office shall recognize the rate of premium which you shall charge, and shall be otherwise satisfied with the risk." Woodworth, J. observes:—"According to the instructions thus given to the agent, when and in what cases were his agreements to insure binding on the respondents? Upon payment of the premium to the agent, the applicant for insurance was subject to the following contingences: *first*, that the premium should be received at the office in New York; *secondly*, that the rate of premium should be recognized at the office; and lastly, that the company should be otherwise satisfied with the risk.

"As to the first, no doubt can arise; for it depends on the fact whether the money has been received or tendered at the office in New York. As to the *second*, it was undoubtedly intended that if the rate of premium taken by the agent, conformed to the rules and regulations of the company, and was not less than the uniform rate before taken in other and similar cases which had invariably received the sanction of the respondents, the applicant would be entitled to a policy of insurance, commencing on the day the premium was paid; for, although it is provided, that the office shall recognize the rate of premium, it must be understood as having referred to the rules and regulations sanctioned by the board of directors, and the powers vested in the agent. The right of the company to exercise their judgment whether the agreement of the agent to insure, corresponded with the instructions given, cannot be questioned. But from the nature of the case it seems necessarily confined within such limits. It cannot be urged that the company reserved or intended to reserve the right of arbitrarily refusing to subscribe the policy, when every prerequisite which they had themselves prescribed, had been fairly and honestly complied with. It must then be confined within the bounds I have already traced; and if so, when the agent presents a case, having received the premium, the fair implication of the proviso is, that the company shall act upon it; and if they decline to act, or do not point out any objection, the presumption is, that none exists, within the true intent of the *proviso* inserted in the instructions.

He concludes by saying:—"If, then, we look to the instructions given, the proposals issued containing the rates of insurance, and the acts of the respondents in reference to similar cases, the conclusion seems to be irresistible,

that the risk and rate of premium were entirely satisfactory. The premium was also tendered in New York and refused, which is a compliance with the first part of the proviso. This, in my view, removes every obstacle in the appellant's way." A majority of the Court of Errors agreeing in this opinion, the decree of the Chancellor was reversed.

The underwriters *name* (by 35 Geo. 3 C. 63 s. 12,) must be subscribed to the policy either by himself personally, or by an agent. See the principle, Com. D. Atto. C. 1. 9 Co. 75 b. And when the instrument is signed by an agent, the name of the principal should be stated in the subscription, (Com Dig. Atto., C. 14,) in the following or a similar form: viz. "A. B. (the underwriter,) by E. F. agent." If a person employed as an agent to subscribe a policy should sign it in his own name, without naming his principal, he would be personally liable on the policy. *Leadbitter* v. *Farrow*, 5 M. & S. 345; *Thomas* v. *Bishop*, 2 Stra. 955. Where a policy is subscribed in the usual form, in the name of an underwriter, by an agent on his behalf, the agent may be appointed by a power of Attorney under seal, or by a written or verbal authority. If a deed under seal be executed by agent, a power of attorney, under seal is in general necessary, *Horsely* v. *Rushstone*, 7, T. R. 209. But, in an action on a policy of insurance subscribed by the defendants agent under a power of attorney, it is sufficient proof of the agency that the defendant is in the habit of paying losses upon policies, so subscribed by the agent in his name, without producing the power of Attorney. *Haughton* v. *Ewbank*, 4 Camp. 88; *Neale* v. *Irving*, 1 Esp. 61. So where an affidavit was produced, in which the deponent stated that he had made the policy on the behalf of the defendant, and it appeared that the defandant had previously used this affidavit on a motion to put off the trial, the evidence of agency was deemed sufficient. *Johnson* v *Ward*, 6 Esp. R. 48.

A memorandum endorsed on the policy for a change of the voyage was signed by the agent of the company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it, though when a policy was required, he always sent the proposals to the company: Held, that this was sufficient proof of the agent's authority; and that the other policies, on which the memorandums had been signed need not be produced. *Brockelbank* v. *Sagrue*, 5 C. & P. 21.

Where a power of attorney signed bv the defendant was given to fifteen persons by name, "jointly or separately, to sign and underwrite all such policies as they or any of them should jointly or severally think proper":—Held, that this was to be construed as a joint and several authority; and that the plaintiff might maintain an action on a policy underwritten by four of the persons therein named, *Guthrie* v. *Armstrong* 1, D. & R. 248; 5 B. & A. 628.

Semble, under a power by A. to B. to underwrite any policy not exceeding 100 £, and to subscribe to the same his (A's) name, and to settle and adjust losses &c., although B. cannot delegate his whole authority to another, yet, having signed a slip for the policy, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the

power, that being only a ministerial act, which he might authorise another to do for him, but he must himself execute the power in all matters in which his judgment and discretion are requisite. In the present case the policy after it was so executed by the clerk of B, having been shown to A, who then offered terms of settlement, it was held that A had adopted the act of *B. Mason* v. *Joseph*, 1 Smith, 406.

Agents of Foreign Offices.—It is provided, (by Massachusetts, R. S. p. 326. s. 40, 41.) that agents of foreign Insurance companies must deposit with the state treasurer a copy of his power of attorney from the company for which he acts.—And must also deposit with the treasurer a statement signed and sworn to by a major part of the directors of the corporation, specifying the amount of its capital, and the manner of its investment, designating the amounts invested, respectively, in mortgages, in public securities, in the stocks of incorporated companies (stating what companies,) and also the amount invested in other securities, particularizing each item of investment; and the agent shall publish such statement, in some newspaper printed in the county where he transacts his agency; and he shall on the first Monday in January, in every year, during the continuance of his agency, deposit a similar statement of the capital of the corporation, and the investment thereof to be annually made out, signed and sworn to, as before described.

It is also provided by the same statute (R. S. p. 326, s. 42.) that no person shall be allowed to act as agent for such foreign insurance company in making contracts of insurance with any person in this state, unless the capital stock of the company, for which he acts, amounts to $200,000, actually paid in in money and invested, exclusively of any obligations of the stockholders of any description, nor unless said company, shall be restricted, by its charter or otherwise, so that it shall not lawfully incur, in any one risk, a greater hazard than one tenth part of its capital.—And by s. 43 it is provided, that if any person shall, as agent, make or renew, directly or indirectly, any contract of insurance within this state, and with any person resident therein, without complying with the requisitions of the three first sections, or in any way contrary to the true intent and meaning of the statute, he shall forfeit for every such offense the sum, of $500.

S. 44. renders the agent liable to pay the tax of one half of one per cent. assessed on the amount insured within the state:—And s. 45. makes it the duty of such agent to make semi-annual returns to the treasurer of the state, (viz. on the 1st Monday in April and October, annually,) of the amount insured or procured to be insured by him in the state as such agent, during the then half year, and shall at the same time pay to the treasurer the said tax of one half of one per cent. thereon.—And by s. 46. it is provided that if such agent shall neglect to make returns or be guilty of fraud in making such returns, he shall forfeit $1000.

S. 47. makes it necessary for such agent to give bonds to the state treasurer in the sum of $5000, conditioned to make such return and to pay such tax. And s. 48 provides that if any such tax or excise shall be hereafter imposed on the agents of insurance companies of other states, any person, acting or

proposing to act as agent in this state, for any company incorporated in another state, may proceed sixty days after the imposition of the tax before giving bond, or paying such tax, or making any return.

2. *Of the Agents for the Assured.*

In general *an obligation* to procure insurance, to be effected on behalf of another person cannot be imposed without the consent of the agent.

Insurances against fire are not in general effected by the agents on the part of the insured, but where such is the case the general rules as between principal and agent will apply, even if a person voluntarily, and without the expectation of any remuneration for his trouble, undertakes to procure an insurance to be effected, though, perhaps, he is not bound to perform his undertaking; yet if, in fact, he do proceed to execute it, he will be answerable for any negligence or unskillfulness in the conduct of it, as appears by the following case: (*Wilkinson* v. *Coverdale*, 1 Esp. R. 75,)—in an action on the case, the declaration stated that the plaintiff purchased certain premises of the defendant, who had a subsisting policy from the Phœnix Fire Office, which he undertook to get renewed on account of the plaintiff, and regularly transferred to him; that he did, in fact, renew the policy and paid £16, which he charged to the plaintiff, but neglected to get it transferred from himself to the plaintiff by the proper indorsement, in consequence of which the plaintiff, who sustained a loss by fire, was unable to recover on the policy. It was admitted that there was no consideration moving from the plaintiff to the defendant, who had gratuitously undertaken to get the policy renewed and transferred, on which Lord Kenyon expressed a doubt whether any action could be maintained on such an undertaking. To remove this doubt, the plaintiff's counsel cited *Wallace* v. *Tellfair*, 2 T. R. 188. n., a case similar to the present, in which Mr. Justice Buller ruled, that though there be no consideration for one party's undertaking to procure an insurance to be effected by another, yet where a party voluntarily undertakes to do it, and proceeds to carry his undertaking into effect by getting a policy underwritten, but does it so negligently and unskillfully that the insured can derive no benefit from it, an action will lie against him. Lord Kenyon acquiesced in this distinction and suffered the cause to proceed, but the plaintiff failed in the proof of any such undertaking and was nonsuited.

An insurance broker may be employed either directly by the owner of the property, or by a third person acting mediately as agent for the person beneficially interested and invested with an express or implied authority. An order given by a partner is binding upon the firm, but it is different with a mere part owner of property, although he be the managing owner. Commissioners appointed to manage and dispose of property, have been held to be clothed with power to effect insurance on the property entrusted to their management. It seems doubtful whether even a general agent to whom goods are consigned may not on account of the advance of the season, or other good cause, in the exercise of his discretion without being expressly directed, pro-

cure an insurance to be made for the benefit of his principal, and charge him with the premium of the insurance. By Buller, J. 1 Bos. & Pul. 323.

An obligation to procure insurance, to be effected on behalf of another person, cannot in general be imposed without the consent of the agent; but though no express consent has been given; it may be implied from the relation in which the parties stand to each other. There are three instances in which an order to insure must be obeyed. By Buller, J. 2 T. R. 189. First, where a merchant abroad has effects in this country in the hands of his correspondent, he has a right, it is said, to expect that the latter will obey an order to insure, because he is entitled to dispose of the money in his correspondent's hands in what manner he pleases. *Smith* v. *Lascelles*, 2 ib. 189. The second class of cases is where the merchant and his correspondent have been connected in a previous course of dealing, the one having been used to send orders for insurance which have been complied with by the other: the former has then a right to expect that his orders for insurance will still be obeyed unless the latter give him notice to discontinue that course of dealing. ib. p. 190. The third instance is, where a merchant abroad sends bills of lading to his correspondent in this country, and engrafts upon them an order to insure as the implied condition on which the bills of lading shall be accepted; the agent must then obey the order, if he accepts the goods, for the transaction is entire. ib; *Corbett* v. *Gordon*, 3 Campb. 473.

And when a person, though without consideration, undertakes to procure an insurance to be effected, and is consequently not under a legal obligation to perform his promise, yet if he proceed to carry it into execution, he will be liable for an injury occasioned by his negligence or unskillfulness. *Williams* v. *Coverdale*, 1 Esp. R. 75; *Wallace* v. *Telford*, ib. 76; *Elsee* v. *Gatward*, 5 T. R. 143; *Seller* v. *Work*, *Marsh. Ins.* 299: 1 Saund. 312, b. n. 2. When a policy broker was directed to effect a policy for which he was to receive no remuneration and he employed another broker, but omitted to deliver to him with the other instructions a letter containing material information respecting the time of the ship's sailing; and in consequence the underwriters refused to pay, the policy broker, although he derived no profit, was held responsible for the loss occasioned by his omission. *Seller* v. *Work*, 1 Marsh Ins. 299.

So although agents may be at liberty to renounce an order to insure, yet if they think fit to accept it, they are bound to carry it into execution as far as by law they may, according to the directions of their principal. Merchants in this country, who are entrusted to insure goods, and include the premium, cannot set up as a defense to an action for not insuring the premium, that they were directed to insure against British capture, for assuming British capture to be an illegal risk, its being inserted would not entirely invalidate the policy. *Glaser* v. *Cowie*, 1 M. & S. 53. But an agent is not bound to comply with an order to insure, if the order when effected would be unavailable in law, although underwriters may have been in the habit of paying losses on similar policies. *Webster* v. *De Tastet*, 7 T. R. 157. The order is not illegal, if the insurance is capable of being rendered lawful by license, before the completion of the adventure. *Haines* v. *Busk*, 5 Taunt. 521, 227. It is also to

be remembered, that the authority of a broker, like that of any other agent is capable of revocation. And Lord Ellenborough, C. J., held that it might be revoked after the signing of the slip, and before the execution of the policy, and consequently, that a broker procuring a policy to be effected under such circumstances, cannot charge his employer with the premiums or commission paid on the execution of the policy. *Warwick* v. *Slade*, 3 Campb. 127.

Duties to insured. An agent cannot in general delegate his authority. The agent is bound to do what is usual, in order to get the insurance effected, but is not obliged to procure insurance at all events. And where no particular directions are given as to the manner in which insurance is to be made, the agent will be protected in the exercise of his discretion, provided he acts *bona fide* to the best of his judgment. When his discretion is not fettered, he may effect the insurance at a well known and established office, although the terms of other insurance offices might be more beneficial to his employer. See Hughes Ins. 95, *et seq.*

Liability to insured. When a broker, who has been ordered to effect a policy, represents that he has executed the order, it seems that an action of trover may be maintained against him for the instrument, although no policy has been actually entered into; and in such an action the person who employed him, on proving his loss, will be entitled to recover to the amount of his actual interest, deducting the premium. *Harding* v. *Carter*, Park, 4. For any negligence or unskillfulness, by which his employer is deprived of the benefit of an insurance, the broker is liable to the same extent as the underwriter would have been if the agent had performed his duty.

An agent cannot dispute the title of his principal; and therefore, if a person as agent for two partners, effect an insurance, charge them for the premiums, and on a loss happening, receive the insurance money, he cannot afterwards be heard to allege that one only was owner of the property insured. *Dixon* v. *Hammond*, 2 B. & A. 310.

Insurance brokers who retain the policies in their hands are bound to use reasonable diligence in settlement of losses that occur, 2 Campb. 343. And they are only entitled to receive payment for the assured from the underwriter in money; and a custom to set off the general balance due from the broker to the underwriter in the settlement of a particular loss is illegal. Therefore, although the broker may have adjusted a loss with the underwriter, and struck his name out of the policy, yet if the underwriter has not actually paid the loss to the agent or broker, the insured may recover it from the underwriter. *Todd* v. *Reid*, 4 B. & A. 210. It is to be observed, however, that it does not appear that the underwriter at the trial succeeded in bringing his case within the custom, as proved. 3 Stark. 16. But until there is an actual payment to the broker, or a credit given, the underwriter is liable for the claim to the assured. *Russell* v. *Bangly*, 4 B. & A. 395; *Jell* v. *Pratt*, 2 Stark, R. 67.

Rights against insured. The broker may maintain an action against the insured, even before he has actually paid the premiums to the underwriter, to recover the amount of them as money paid to his use. *Dalzell* v. *Mair*, 1 Campb. 441; *Airy* v. *Bland*, Park 36; Marsh. Ins. 294. The premium is con-

sidered as paid at the time of effecting the policy. And after payment of the amount of a loss by a broker to his principal, the broker cannot recover it back, on the ground of his not being aware at the time that one of the underwriters had become insolvent; *Edgar* v. *Bumstead*, 1 Campb. 441; nor can he after settling an account, receiving the balance, and suffering two years to elapse, make a further claim upon his principal on such a ground. *Jameson* v. *Swaisnton*, 2 ib. 576. He is entitled to no expenses incurred in effecting an illegal insurance. 3 Ves. Jr. 343; 2 Wils. 133.

The remedy of an insurance broker to recover for charges is either by action or lien. Brokers have a lien for a general balance due from their employers upon the policies; and have a right to apply in satisfaction of that balance, money received by them on account of the insurances. But when the person employing a broker is himself an agent, and that circumstance is known to the broker, the latter has no lien against the principal for the general balance due from the party by whom he is immediately employed. Nor can a broker, who has reason to conclude that his employer acted as agent, claim a right to retain for a general balance, though the policy is effected in the name of his employer. But on the other hand an insurance broker who effects a policy without knowing or having any reason to believe that the party from whom he receives the order is not a principal, has a lien upon the policy for a general balance due to him from that party, and has a right to apply in satisfaction of that balance, money received upon the policy even after notice that his employer was himself merely an agent. The broker cannot then be divested of his rights on account of a fact of which he was ignorant when he effected the policy; he cannot be compelled to deliver up to a stranger, the policy which he effected under an implied contract that he should hold it as a security for the balance due to him from his immediate employer. The agent by whom the broker is employed is guilty of a breach of duty towards his principal in not disclosing to the broker that he is a mere agent in the transaction, and is liable to an action for his misconduct; but the broker who has reason to believe that he is the principal is entitled to retain the policy till his general balance is satisfied. By parting with the possession of the policy, the broker will lose his right of lien: but it seems that his lien will revive on regaining the policy, although it is put into his hands for a particular purpose; as, for instance, for the purpose of collecting an average loss from the underwriters. Hughes Insu. 102, *et seq.*

2d. An insurance broker is *liable* to the underwriter for the premium, and in certain cases for the amount of a loss paid through mistake. The policy usually contains a receipt for the premium, which is conclusive as between the insured and insurer, and in the absence of any fraud, precludes the latter from recovering it as against the insured. In general the broker alone is liable for the premiums. The insurers may resort to the broker for recovery back of the amount of a loss which they afterwards discovered to be fraudulent, where he has not paid it over to his principal. And the mere passing of such money in account, without any new credit given, is not equivalent to a payment of the money to his principal.

CHAPTER V.

OF THE FORM AND REQUISITES OF A POLICY OF INSURANCE.

The policy of insurance, is a written contract, signed by the insurer, or an agent on his behalf; or, in the case of an insurance by a corporation, by the authorised agent of the company, who is usually the president. The instrument is not authenticated by the signature of the insured, or the party by whom the protection of the policy is sought.

The Massachusetts Revised Statutes, p. 321, s. 13, makes it necessary that "all policies shall be subscribed by the President, or in case of his death, inability, or absence, by any two of the directors, and countersigned by the secretary of the company; and they shall be binding upon the company in like manner as if executed under the corporate seal thereof."

The *premium* paid on the insurance, the *sum* insured and the *name* of the insurer must by the law and practice, be inserted in the policy. (See Form in Appendix.)

In *Levy* v. *Merrill*, 4 Greenl. R. 180, where a marine policy contained the words—"Touching the risks I am willing to bear, the same as contained in the regular policies of insurance, and should any difficulty arise in adjusting this policy, I am willing that the same should be adjusted according to the rules established at Loyd's or at the regular insurance offices in the United States." Defendant insisted that the policy did not extend to a capture, and offered to prove by parol that such was the understanding of the parties. Weston, J. "The form of the policy now used in London and which it seems has varied very little for 200 years, embraces losses arising from "men of war, pirates, enemies, rovers, takings at sea, arrests, restraints, detainments of all kings, princes and people of what nation, condition or quality soever." These risks among others are to be found also in the common printed forms in this country. Loss by capture, then being one of the usual risks contained in regular policies, is clearly included in the one in question. And we are not at liberty to vary a contract, the terms of which are thus explicit, from any considerations drawn from the amount of the premium, or from the letter of the assured to the correspondent, adduced to shew the sense of the contract, written with a view to obtain indemnity from another quarter.

1. *Contract when consummated.* An assured can recover on a policy executed after the loss has accrued, and become known to both parties. Thus, in *Mead* v. *Davison*, 3 Adol. & Ell. 303, a policy of insurance on a ship, lost or not lost, is good, the ship having been accepted for insurance, and the pre-

mium paid, before loss, although the policy was not actually executed and stamped till loss had happened, and both insurer and insured know it. The insured bought and paid for the underwriter's promise to indemnify. If his ship had arrived, the underwriter could have kept the whole premium: though she has perished, he cannot be relieved from his agreement. Equity would have compelled him to execute the formal policy, whenever tendered to him: in voluntarily executing, he has only performed a manifest duty, and cannot now retract the obligation.

There must be a complete contract of insurance between the parties; a negotiation which has not resulted in a contract, is not sufficient. 10 Pick, 326.

Where the premium has been paid at the proper office of the company, and the authorised agent or officer has acknowledged the receipt thereof, it is not to be doubted that the insurance would be as binding as if a policy had been executed. Such receipts are in common use, and are intended to give immediate effect to the insurance, and supply the place of a formal policy, until one can be prepared. It is settled that these receipts are as binding as a policy could be. In truth, the receipt answers all the use of a policy, except that the latter authorizes the assured, in case of loss, to sue in a court of law, instead of being obliged to resort to a court of Chancery. Per Woodworth, J. in 4 Cowen, 661.

Where the plaintiff wrote by mail inquiring the terms of insurance, and the defendants wrote in reply stating the premium; but on the next day wrote again and retracted their offer. In the mean time the plaintiff had accepted the offer made by letter, which had been put into the post office, notifying defendants of such acceptance before the receipt of the second letter: Held that the contract was not consummated. *M'Cullock* v. *The Eagle Ins. Co.*, 1 Pick. 278. However, the case of *Mactier* v. *Frith*, 6 Wend. 116, is different.

The policy in general is supposed to contain the whole of the contract, The insurers having a description of the property in their possession, are presumed to insert in the policy itself, as much of that description as they deem material, and by omitting any part of it, they show that they are content to take such part as a representation merely, and to look to it only, for the purpose of estimating the risk. 1 Cond. Marsh. 451. Every paper referred to in the policy, is not to be considered as incorporated in it. By Oakley J. 2 Hall, 628. A reference in the policy in general terms to a description of the buildings filed in the office, is not to be considered as incorporated into the policy, so as to amount to a warranty that the buildings shall conform exactly to the description. *Delonguemare* v. *The Tradesman's Ins. Co.* 2 Hall, 589.

A description of the subject of insurance may, when embodied in the policy, amount to a warranty that the subject is such as the policy describes it to be. To have that effect, however, it seems that such description must appear on the face of the policy: it is not sufficient that the descriptions or expressions are contained in other documents to which the policy may refer. Consequently a description in a report or survey, not incorporated in a policy, nor attached to it, as part of the accompanying instrument, is held not to be a

warranty, simply because the policy refers to it, as containing a further specification of the property insured. By Jones C. J. ib.

The "printed forms, calculated as they are for ordinary risks, and containing the provisions and conditions usually attached to insurances upon them, must necessarily be general and comprehensive in their terms, and cannot be adapted to insurances upon other and special hazards. It is the ordinary course of effecting insurances, that upon each application, a special agreement is made between the applicant and the underwriter, designating and describing the premises required to be insured, and settling the terms of that particular insurance, and the policy is then completed by filling up the blank spaces, left for that purpose in the printed form, with suitable words and clauses to express the contract thus agreed upon. This is the usual mode of consummating the contract, and it is the general practice to leave the printed form of the policy unaltered, without expunging or modifying the parts of it which conflict with the written clause. ib.

"But these written clauses nevertheless contain the elements of the contract, and being framed under the immediate eye of the parties, and without a reference to the terms of the previous arrangement between them, they not unfrequently present a contract to which some of the printed parts of the policy are inapplicable, and as effect must be given to the acknowledged intention of the parties, they must necessarily supersede or control such of the printed clauses as would if enforced and literally applied, be inconsistent with them. In this policy a written description is given of the premises insured, which designates and describes the buildings and their contents in general terms as a manufactory of china ware. The agreement is to insure the plaintiff upon a factory of that description in actual operation, and upon the machinery and stock finished and unfinished contained therein. This is a vital part of the contract and must have its full and entire effect and operation, uncontrolled and untrammelled by the printed parts of the policy. It was the purpose and design of the memorandum of special rates, to which the policy refers, to enumerate and specify the several trades, business and vocations which were supposed to endanger the safety of the buildings insured, and to entitle the underwriter to a higher rate of premium, and it was the object of the prohibitory clause, to provide that the exercise of those extra hazardous trades should not be permitted, unless with the assent of the insurers. But that general provision was not adapted, and could not be intended to apply to a trade or vocation, which the policy in terms insures, or by necessary implication permits.

"The written and the printed parts of the policy, when they harmonize, are equally operative and binding upon the parties; but whenever they come into conflict, the written clauses, as expressing the special agreement and declared intention of the parties at the time of the contract, must prevail, and the printed parts of the policy be held subordinate, and be taken and construed in the qualified and restricted sense, so as to confine them to the declared purpose and intention of the parties as expressed in the written clauses. On that principle, the express written agreement of the company to insure a manufac-

tory of china ware in full operation, inserted in this policy, necessarily authorised the exercising of those trades and avocations, in the buildings insured which appertained to the establishment, and were required for the judicious management and transaction of its accustomed operations and business. It follows, that the general printed clause against the clause of extra-hazardous trades, must be restricted in its operation, to trades which the conductors of a china factory do not require for the transaction of the ordinary business of the establishment, and cannot be applied to any trade or vocation necessarily or usually attached to such manufactories.

The case also of *Stebbins* v. *The Globe Insurance Co.* 2 Hall, 632, decides that a general reference in a policy to a description of the insured property, on file in the office of the assurers is not to be considered a warranty, except it appear on the face of the policy. The action is on a fire policy, dated January the 5th, A. D. 1827. The property insured is described in the policy, as "a framed building in three tenements, situate on the "corner of New York wharf and Commerce street, in the city of "Mobile, privileged to contain hazardous goods, per report no. "36, 748, filed in the Washington Office." The application for insurance, bears date at Mobile, on the 23d of Nov. 1826, and gives a description of the premises to be insured; and, with a view to point out their situation with respect to contiguous buildings, there is subjoined to, or inserted in the application, a map or diagram, on which the store of the plaintiff is marked out, and also two stores adjoining thereto; and in the rear of the whole, the word "vacant" is written. The New York wharf and Commerce street, mentioned in the policy, are laid down on the diagram, and also two other streets, called Alabama street and Water street, forming in the whole a square, or parallelogram. The plan or map contains no building except the three stores above-mentioned,—all of which front on Commerce street.

At the trial, the defendants offered to prove, that subsequently to the insurance, the plaintiff had erected other buildings, immediately contiguous to the store insured, and on the ground represented as vacant, and that the risk of loss was thereby increased. The judge rejected the evidence, unless the defendants meant to show that the intention of the plaintiff, at the time of effecting the insurance, was to erect these buildings, and that he had concealed that intention, or that the fire was occasioned by, or originated in the adjacent buildings so erected.

2. *Description of the Parties.*

Previous to the stat. 25 Geo. C. 44, which required the name of the insured or that of his agent to be inserted in the policy, it was the practice of the English underwriters to sign their policies *in blank*, which authorised his agent to fill it up in such manner as he thought proper. If such a custom prevails in this country, the blank may be filled with the names of any persons who are legally entitled to the benefit thereof, and if the words, *for whom it may concern*, were inserted in the blank they could not have extended its legal effect

any further. By Chancellor, 8 Wend. 150. See the case of *Nelson* v. *Dubois*, 13 J. R. 175: *Joselyn* v. *Ames*, 13 Mass. 274.

The maxim *expressio uniues est exclusio alterius* applies emphatically in the naming of the party assured in the policy of insurance; especially when the contract is guarded against over-insurance, or a single subscription, exceeding the property at risk. Each policy and underwriter, where there are several upon one risk, is distinguished as engaged in a separate concern; and the liability of the insurer depends upon the order of time, in which the policies or subscription are effected. Per Sewall, J. in 6 Mass. 81.

In a marine policy, the general term *owner* is used often, not in its strict legal sense, but as equivalent to *whomsoever it may concern*, leaving the party who may claim the benefit of the policy, to establish by evidence, that he caused it to be effected for his own security. This principle was settled in *Lawrence* v. *Van Horn and Clarkson*, 1 Caines, 276. There it was a joint adventure by three parties, having distinct interests. The plaintiffs being one of the parties, effected an insurance to a certain amount, on the cargo generally, whether in their own names or as owners does not appear, and it was held by the court that the assured is not required to state the particular interest or proportion of interest which he intends to have insured; that it is sufficient if he have an insurable interest to the amount insured, and it is immaterial whether it be a distinct or undivided interest. In *Catlett* v. *Pacific Ins. Co.*, 1 Wend. 561, (affirmed 4 Wend. 75,) it appeared that the insurance *was in fact intended for the several interest of one of the parties*, and a witness who was one of the partners, testified that the plaintiffs had no authority to insure except *on their own account:* Held, that the party causing insurance to be made for his separate benefit may maintain an action on the policy, although the only designation which it contained of the assured was, where it states "*that Le Roy, Bayard, & Co. on account of the owners, did make insurance*"—it appearing in evidence that the two plaintiffs Catlett and Keith, Jr. wrote to Le Roy, & Co. to effect the insurance on the joint account *of Mr. James Keith, Jr. and himself.*

The marine policy is most commonly general in its terms, comprehending in its indemnity all who are interested in the subject of insurance, while the fire policy limits its protection to those who are specially named in it. 13 Mass. 67; ib. 269.

A marine policy "on account of the owners" without naming the persons, and two of three owners claimed the right to recover: and the court held that the term *owners* was equivalent to *whomsoever it may concern;* and it was for the party who claims the benefit of the policy to establish by evidence that he caused it to be effected for his own security. *Catlett* v. *The Pacific Ins. Co.* 1 Wend. 561. So, the words *for whom it may concern*, enable any one having a special interest in the property insured, to recover provided he was intended to be insured. 4 id. 75. S. C.; *Turner* v. *Burrows*, 5 id. 531; 8 id. 144, S. C.

The words in a marine policy, owners of the brig Sampson," are merely words of description of the persons interested. And where the insurance was in these words "cause Foster and Thompson to be assured, lost or not lost, one thousand dollars, on property on board the brig Sampson," the court held,

that it might be shown by extrinsic evidence, that the plaintiff intended that the policy should cover separate or joint property or both. And even where the assured are not named in the policy, it is competent to prove who they are by extrinsic evidence. *Foster* v. *U. S. Ins. Co.* 11 Pick., 85. See also the case of *Lawrence* v. *Van Horne*, 1 Caines, 276, where one of three parties interested in a joint adventure, but their interests were distinct, effected an insurance on the cargo generally without specifying any particular interest; and the court held that the owners were equitably entitled to their shares in severalty, and that the interest of each might be severally enforced under a general policy. Here, it appeared that the insurance was in fact intended for the several interest of one of the parties; and one of the partners testified that the plaintiffs had no authority to insure, except *on their own account.*

An insurance effected by an agent, insuring by the order, and on the account of his principal solely, or by a naked consignee, who has the possession merely without the power to dispose of the subject he insures, would be for the indemnity of the owner; and the policy must be in his name, or the terms of it must be sufficiently comprehensive to embrace him, and cover his interest. And the loss, moreover, which may happen, must be recovered on an averment of interest in him. These are rules which apply also to policies expressly declared to be for the benefit of the principal, and not professing to be upon any interest of the agent or factor, who effects them. By Jones, C. J., in *De Forest* v. *The Fulton Fire Ins. Co.* 1 Hall, 84. But such a requisition is not necessary where the insurance is made for the protection and indemnity of the factor or commission merchant against loss or damage to any goods or merchandise, that may chance to be in his warehouse, at the time of the fire, and may then belong to him, or be held by him for sale on commission, as the factor of others. These factors need not insert the names of their principals in the policy; the insurance may be stated for whom it may concern. If an insurance be for the use of the plaintiff and others, for whom they act as agents, some general expression might be requisite to extend its protection to the assured, who are not specifically named in the policy.

If a policy is effected by an agent in his own name as agent for another, the latter cannot maintain an action for the use of a third person. *Russell* v. *The New England Marine Ins. Co.*, 4 Mass. 82. The policy was effected in the name of Israel Munson, as agent for the plaintiff, by which the defendants undertook to insure the plaintiff. The action was brought to recover a loss for the use of Evarts and others, who were alone interested in the property insured; and the court decided that the action could not be maintained. They cited the case of *Graves* v. *The Boston M. I. Co.* 2 Cranch, 419, as an authority in point. A distinction attempted between that and the former case, was, that Graves had an interest which the policy might protect; but Russell had no interest and the policy would be void. Parsons, C. J. says "that distinction does not appear to us to make any difference. The alteration of the policy from the old form was made, because the assured would know the persons for whom they would answer. But if any man having no interest, nor calling himself agent to excite the inquiry of the underwriters might cause

himself to be insured, the intent and design of the alteration of the policy would be defeated, and the underwriters entrapped to insure the property of a man, whose property they must suppose they had not insured."

A marine policy executed in blank is considered *for account of whom it may concern;* and the holders of the policy may fill the blank with the names of the persons intended to be insured. *Turner* v. *Burrows*, 8 Wend. 144. A person not intended to be insured cannot derive any benefit from a policy effected by others. *Pacific Ins. Co.* v. *Catlett*, 4 ib. 75. If, however, a part owner effects an insurance *for account of whom it may concern*, or *for account of the owners*, any one having an interest may claim a benefit from the policy. And although done without authority, yet a subsequent ratification by the person claiming the benefit is sufficient. *Turner* v. *Burrows*, 8 Wend. 144.

In *The Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72, the policy insured two part-owners of a building by name, *or whom it may concern;*—stipulating that the loss should be paid to the individuals named:—And it was held, that the persons named were entitled to recover the whole sum insured, although it appear that they own but one half of the subject insured.

In *Lawrence and Whitney* v. *Van Horn & Clarkson*, 1 Caines 276, it was a joint adventure by three parties, having distinct interests. The plaintiffs being one of the parties, effected an insurance to a certain amount, on the cargo generally, whether in their own names or as owners, does not appear; and it was contended that the legal construction of the policy was, that the whole cargo was insured, and that it was not competent for a party, under such a policy to aver in his declaration an interest in one third and recover accordingly; that he was bound to specify in his policy the interest in the cargo which he intended to insure. But it was held by the court that the assured is not required to state the particular interest or proportion of interest which he intends to have insured; that it is sufficient if he have an insurable interest to the amount insured, and it is immaterial whether it be a distinct or individual share. And it is remarked that it may often be difficult to ascertain the interest of each with certainty; that the owners are equitably entitled to their shares in severalty, and that the interest of each ought to be permitted to be severally enforced under a general policy. In that case, it appeared that the insurance *was in fact intended for the several interest of one of the parties*, and a witness who was one of the partners, testified that the plaintiffs had no authority to insure except *on their own account.*

Where the plaintiff chartered a ship from R. to T. and back to the United States, for which he was to pay $750, at T, and $750, on herreturn. A cargo was put on board at R. by a stranger, the freight of which, amounting to $1003, was to be paid to the plaintiff at T—— Plaintiff effected insurance for $1000, on freight at and from R. to T. and at and from thence to the United States, and $500, on freight at and from T. to the United States, the freight being valued at 1500 dollars. The ship was lost on outward passage, so that nothing become due from the plaintiff to the owner. It was held, that the plaintiff had an insurable interest; that it was protected by the terms of the policy; and that if the valuation was fairly made, with a knowledge of all the

facts, the plaintiff was entitled to recover $1000, pursuant to the valuation, but if the valuation was evasive and a cover for a larger sum, it should be set aside and the plaintiff should recover according to his actual interest. *Clark* v. *Ocean Ins. Co.* 16 Pick. 289.

A policy of insurance upon profits valued at 1000 dollars, and it appeared that the plaintiff had entered into a contract with one R., in which it was agreed, that plaintiff, in consideration of 1000 dollars paid by R., should have a right to take one half of any palm leaf imported by R., upon paying one half the costs and charges on its arrival at Boston ; that subsequently having received a bill of lading of palm leaf shipped upon his account, applied to plaintiff to elect whether he would take one half or not ; that plaintiff elected to take it, and paid R., 600 dollars, as an advance on it, which was repaid to him after it was known that the palm leaf had been discharged at Charleston in a damaged condition. Held, that plaintiff had an insurable interest in the profits, and was entitled to recover for a total loss, notwithstanding a small salvage had been received by R. *French* v. *Hope Ins. Co.* 16 Pick. 397.

3. *Description of the property or subject of insurance.*

The representation must be true in substance ; a false representation is not a breach of the contract unless it be material. Wilde, J. in 10 Pick. 535. If it does not in fact effect the rate of insurance or change the actual risk, it can scarcely be deemed *material.* 7 Wend. 72. A mistake or omission by the assured in his representation of the risk, whether wilful or accidental, if material to the risk insured avoids the contract. *Fowler* v. *The Aetna Ins. Co.*, 6. Cowen, 673 ; 4 Mass. 337.

The proposals and conditions attached to the policy form part of the contract, and have the same force and effect as if contained in the body of the policy. *Duncan* v. *Sun F. Ins. Co.*, 6 Wend. 488. The stipulations in policies are considered express warranties. ib.

The nature of the assured's interest need not be stated in the policy, nor disclosed to the underwriter when the policy is subscribed. 13 Mass. 66. 544 ; 17 ib. 613. However, if the underwriter makes inquiry, there must be no concealment, nor false representation or affirmation. 13. ib. 67 ; 269.

Though the insurance against fire is restricted to the assured specially named in the policy. But the indemnity to the assured will embrace his entire interest in the subject insured ; and no principle, or adjudged case, prescribes a narrower rule of insurable interest of a policy against the perils of the sea. The subject of insurance may be such as not to admit of any other insurable interest, than the beneficial ownership ; whatever interest the assured might insure against maratime risks, he may insure against fire. And, indeed, the marine policies usually, if not universally, comprehend an indemnity against loss or damage by fire, during the voyage or term for which the insurance is effected ; and the only difference between a marine policy which enumerates loss by fire as one of the risks insured against, and a fire policy insuring against loss or damage by fire, is that the one protects the property

from loss by fire on board of a ship, and the other from fire in a warehouse. Per Jones, C. J. in 1 Hall, 113.

The policy should contain a true description of the subject of insurance; but a trifling inaccuracy will not vitiate. Thus, in *Hall* v. *Molineux*, 6 East, 385, a mistake in the ship's name was held not to be material if its identity be proved. So, though the goods insured, have been described by wrong marks. Yet if the wrong description was made by mistake, and it is immaterial to the risk, whether the description was by one mark or another, the variance is immaterial. *Ruan* v. *Gardner*, 3 Wash. C. C. R. 146.

It is well settled, as an established principle of the law of insurance, that a *bona fide* equitable interest in property of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after an inquiry of the true state of the property; and that the applicant need not represent the particular interest he has at the time, unless inquired of by the company. By the Court, Nelson, J. in *Tyler* v. *Aetna Ins. Co.* 12 Wend. 507; *Locke* v. *North Am. Ins. Co.* 13 Mass. 61; *Bartlett* v. *Walter*, ib. 267; *Oliver* v. *Green*, 3 ib. 133. 4 ib. 330; 8 Pick. 89. And such is the doctrine of the courts in England. In the case from Wendell, Tyler (plff.) in his application to the defendants' agent, wrote thus "I wish to effect an insurance at the office, of which you are the agent, *on my house* in which I reside," &c. adding, "I would wish to insure $1800 on my buildings for one year." Subsequently defendants insured plaintiffs' *two story frame house* for $1500. It appeared on the trial that Tyler held a contract for a deed of the premises, upon which he had paid about 800 dollars; and about five hundred dollars more remained to be paid:—Held, that he had an insurable interest in the property, and was not bound to disclose the nature or extent of his interest on the application, unless particularly inquired of by the company; and that he had a right to insure as general owner. Nelson, J. in delivering the judgment of the court says:—"The *nature* and *extent* of the interest of the insured may in some instances be material facts in making up an estimate of the risk and rate of premium, and upon general principles, applicable to this action, a disclosure would seem to be required; but generally they cannot be so material as to justify a conclusion that they would have varied the premium paid. The necessity of disclosing the title of the applicant would greatly embarrass the operation of insurance, without affording any essential benefit to the offices. Any error in the description of title might be fatal. The rights of the insurer are sufficiently guarded, by having it in his power to exact, by inquiry, a description of the interest of the applicant, and by the recovery being limited in cases of loss to the value of the interest proved on the trial. The minuteness of the proposals and conditions, as to the description required of property to be insured, without specifying the nature or extent of the interest, affords a reasonable inference that this information is not deemed generally material and indispensable. The insurer is only responsible to the extent of the interest of the applicant, and that must be shewn upon the trial. The only object, therefore, in the previous disclosure of it, is, to enable the insurers to estimate the risk and pre-

mium." Again—"we do not perceive how he could be more deeply interested in the preservation of the property by having the fee than he now is; and the materiality of the disclosure is founded upon the idea that his interest in the preservation would be less in the present state of the title."

By Factors or Commission Merchants. The form of insurance, now in use, is by a general policy, in the name of the factor or commission merchant, on all goods that may be in his store or warehouse, at any time within a given period, to a specified amount, whether held by him as owner, or in trust, or on commission. *De Forest* v, *The Fulton Fire Ins. Co.* 1 Hall, 84. Defendants insured De Forest and Son, the plaintiffs, against loss or damage by fire, to the amount of $10,000, on goods and merchandise, hazardous and not hazardous, as well the property of the assured, as held by them in trust or on commission, contained in the Store No. 82 South street, for the term of one year. And the insurers promise and agree to make good to the insured, all such loss or damage, as should happen by fire to the property; such loss or damage to be estimated according to the true and actual value of the property at the time the loss should happen. A fire happened within the year, by which loss and damage was sustained on goods and merchandise, partly the property of the plaintiffs, and partly held by them on commission, then in the store described in the policy, to a large amount. The question was upon the extent of the liability of the insurers for the goods held on commission:—the plaintiffs insisted upon the right to recover the full amount of the loss and damage to those goods by the fire; and the defendants contended, that they were bound to indemnify to the amount only, of loss, sustained by the plaintiffs in their own right thereby. The insurers insisted that the plaintiffs were entitled to recover to the amount of their advances on the goods on commission, with interest, and their mercantile commissions and charges as factors; and that these were the only interests the plaintiffs had at risk at the time of the fire, and that all they could claim is an indemnity to themselves for their own loss. The court were of opinion that the plaintiffs were entitled to judgment for the amount of the entire loss sustained on the goods the plaintiffs held on consignment for sale.

Goods held in trust or on commission cannot be covered by a mere insurance of the assured's own property; they should be specified in the policy as goods held in trust or on commission:—especially where the condition of the policy expressly declares, that "goods held in trust or on commission," shall not be covered, unless they are insured as *such*. *Bricta* v. *N. Y. Lafayette Ins. Co.* 2 Hall, 372. In this case, the plaintiff effected an insurance to the amount of 800 dollars, "on furniture and goods contained in his counting room, No. 3, Phœnix Buildings." Among the items of loss, the plaintiff claimed the right to recover the value of certain piano fortes, watches, &c. belonging to other persons, but which were deposited with him for sale, and on which he had made advances. His business was not that of a commission Merchant, and it did not appear that there was any agreement by which he was to receive a commission for selling. Held, that they were not covered by the policy. Mr. Justice Oakley, makes the following observations:—

"Among the items of loss allowed by the jury, were the advances made by the plaintiff on certain piano fortes, watches, &c. The judge charged the jury, that the plaintiff, had a right to recover to the extent of his advances on those articles, and the defendants insist, that the charge was in this respect erroneous.

"The third condition annexed to the policy, declares, that "goods held in trust or on commission," shall not be covered, unless they are insured as such. The articles in question, were not the property of the plaintiff; they were held by him "in trust or on "commission." He had a lien upon them for advances, which could have been defeated, by a repayment of the money advanced. His interest was not absolute, but conditional; and it could not be covered by a mere insurance upon his own property If the goods in question were to be covered by the policy, they should have been specified in it as goods held in trust or on commission, and it would be violating the plain terms of the third condition annexed to the policy, if this claim were to be allowed. The Judge's charge was, therefore, in this respect erroneous, and there must be a new trial, unless the plaintiff will strike from the amount of his verdict, the advances upon the property deposited with him. In that case, the verdict for the residue may stand, and the plaintiff can enter up his judgment for that amount.

The form adopted say the court in *De Forest* v. *The Fulton Fire Ins. Co. supra*, "seems appropriate to the factor's employment, and renders an insurance by him in any other form, not only inconvenient, but impracticable; or extremely difficult in practice. He holds himself out to the world as a commission merchant, and solicits the consignment of all who may have goods for sale. The purpose of the consignments is the sale of the goods, and the merchandise of different employers, passes in succession under his operations and agency. The goods of A., which occupy a place in his warehouse, at the present moment, may be sold before the close of the day, and the goods of B. take their place to-morrow; and in the course of thirty days, as many different lots of merchandise may have had the shelter of his warehouse, and been exposed for different periods of time, to the risk of loss or damage by fire therein.

How is the factor to protect these different interests by insurance? If he is bound to specify each, he must either open a separate policy on each, or cause a specification of each to be endorsed on a general policy covering the goods of whomsoever it may concern: either of which methods would be attended, in an extensive establishment, with insuperable difficulties, and neither of them fully accomplish the object.

"These considerations may have led to the form of insurance now in use, by a general policy like the present, in the name of the commission merchant, on all goods that may be in his warehouse, at any time within a given period, to a specified amount, whether held by him as owner, or in trust, or on commission. Such a contract meets the exigencies of the case; for under it the insurers will be answerable for loss or damage by fire, within the terms of the insurance, to whatever merchandise or property may happen to be in the

warehouse at the time of the fire, and be then held by the assured, as general or special owner, without regard to the time of his receipt of the goods in store, or the persons who may be interested in them.

"The policy effected by the insured in this case, was manifestly intended for such a contract, to which it seems to us, fitly adapted. It insures the plaintiffs for one year upon all goods, wares and merchandise, in the warehouse which it describes, which shall belong to them, or be held by them in trust, or on commission, to the amount of $10,000: and it is admitted, that the surable interest of the assured in their own goods, and the goods of their principals, which were in the warehouse at the time of the fire, was covered by the policy. And if the plaintiffs, as consignees, had an insurable interest in the goods held by them on commission, to the extent of the value of the consignments, they were undeniably protected by the policy, and a more particular specification of the interest of the consignees, if otherwise necessary, was dispensed with by the parties to the contract.

In the case of *De Forest* v. *The Fulton Fire Ins. Co*, 1 Hall, 84, 136, Mr. Justice Oakley makes the following observations.

"In the policies now before us, it is stipulated, that the assured shall notify to the company, any other insurance, which they had effected, or should effect, on the property insured. The defendants have provided, as far as they deemed it expedient, against double insurance. They were apprized that other persons, than the assured, were insured in the property insured: and they might have guarded against the acts of the consignors of the 'goods held on commission,' by requiring the assured to disclose the names of such consignors, from time to time, as their consignments came under the protection of the policies.

"There is another view of this case, which will also result in establishing the liability of the defendants, to the full value of the 'goods held on commission' by the plaintiffs. In marine policies, effected in the name of a particular person, where it is intended to cover the interest of other parties, it is usual to insert the clause 'for whom it may concern.' And it seems well established, that a policy containing such a clause, or other equivalent ones, will protect the interest of any person in the property insured, in whose behalf the assured has a right to act as agent.

"Now, whatever doubt may be raised as to the extent of the insurable interest of a factor; it cannot be questioned, that as agent of his principal, he may effect insurance, for his benefit. The words 'goods held on commission' in these policies, are equivalent to the clause, 'for whom it may concern,' usually inserted in marine policies. They contain a distinct declaration to the insurers, that the assured were acting for the benefit of their consignors: and that other interests, than their own, were to be protected by the policies.

"In this view of the policies, it would be necessary to consider, how far the plaintiffs could recover upon the pleadings in this case, beyond the extent of their own absolute interest; or how far the averment of interest in themselves is supported by proof of interest in their consignors. In *Bell* v. *Ainsley*, [16, East, 141.] it is said, that since the statute 19 Geo. 2. c. 27. (which declared in-

surances without interest, by way of gaming, void,) 'the constant practice has been to state in whom the interest is, and for 'whom the policy was made, and to make that statement according to real fact.' And in that case it was held, that joint owners of property, insured for their joint use, cannot recover on a count, averring the interest to be in one of them.

"In *Cohen* v. *Hannam*, [5 Taunt. 107.] the same rule, as to the averment of interest, was laid down.

"If the present case was governed by the rule above referred to, it would follow, that upon the declaration, as it now stands, there could be no evidence admitted, of any interest in the goods insured, other than that of the plaintiffs. If the cause turned upon this view of the policies, it would be necessary to consider, how far the rule, as to the averment of interest above alluded to, has its origin in the English statute in restraint of gaming insurances. I prefer, however, that my opinion should rest on the broad ground, that the plaintiff had an insurable interest in the 'goods held on commission,' to their full value, without regard to their lien; and if I am correct in this, there can be no question as to the pleadings in the case.

"The result of our opinion is, that there must be judgment for the plaintiffs for the amount of the entire loss sustained on the goods."

In the case of the *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. R 25, the application was in these words: "What premium will you ask to insure the following property, belonging to *Lawrence & Poindexter*, for one year, against loss or damage by fire, on *their stone mill*." It appeared on the trial that Lawrence & Poindexter held one third of the property in fee, and the other two thirds as assignees of a mortgagee, and a moiety of the whole of the title was held under a contract which had expired. The court decided that the plaintiff had an insurable interest, but that the description of their interest in the property was material to the risk, and not truly stated.

A contract of insurance respecting one subject matter cannot be enforced as comprising another subject matter not within the intent of the parties. Goods, the property of the plaintiff, were expected, and these were insured. No goods of that description, were shipped, and although goods of another description, the property of other persons, were shipped, and in which the plaintiff might have acquired a special interest and control; yet of these the plaintiff had no knowledge; nor had he any intention to insure them, either for the shippers or on his own account: Held, that the plaintiff was not entitled to recover. *Toppan* v. *Atkinson*, 2 Mass. 365; *Martin* v. *Sitwell*, 1 Show. 156, cited in Park 368, and in Marsh. 99; Hughes, (Am ed.) p. 335. Yet it is every day's practice, to insure goods before the goods are bought; consequently, an averment in a declaration on a policy of insurance, that the plaintiff was interested at the time of effecting the policy, and also at the time of the loss is satisfied by proof of interest at the time of the loss; the other part of the allegation being immaterial, and consequently, not necessary to be established by proof. Hughes, (Am ed. p. 42.)

4. *General Construction of a Policy.*

Where the *written* clause in a policy, is inconsistent with the printed parts of it, the former will be deemed and taken as the contract of the parties. *Coster* v. *Phœnix Ins. Co.*, 2 Wash. R. 51; 16 Mart. Lou. R. 681.

A policy of insurance "is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade or the like acquired a peculiar sense distinct from the popular meaning of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of insurance and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning; and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general *formula*, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.' Per Ld Ellenborough in 4 East 135.

Though the representation in the party's application for insurance is not strictly accurate and full, if fairly made, and true in substance, it will not vitiate the policy. Per Wilde, J. in 10 Pick. 535. Although the description in the application may differ very considerably from the actual state of the property, if such variation were not fraudulently intended, and did not in fact effect the rate of insurance, or change the actual risk, it can scarcely be deemed *material*, and is not a breach of the contract. Per Sutherland, J. in 7 Wend. 72.

Goods insured were described in the policy to be in the dwelling-house of the insured; the insured had only one room, as a lodger, in which the goods were:—Held correctly described within the condition, that "the houses, buildings, or other places, where goods are deposited and kept, shall be truly and accurately described;" such condition relating to the construction of the house, and not to the interest of the parties in it. *Friendlander* v. *London Ass. Co.*, 1 M. & Rob. 171—Tenderden.

5. *Particular Clauses.*

The words "a frame house filled in with brick," may be shown by parol

evidence to have acquired by the custom or usage of insurers and insured a particular and technical meaning, different from that which the words might generally be understood to import. They are not definite and unequivocal in themselves; they may apply to the *partitions* as well as to the *external frame* of the house. *Fowler* v. *Ætna F. Ins. Co.*, 7 Wend. 270.

If any terms in a policy have by the known usage, or by use and practice, as between assurers and insured, acquired an appropriate sense, they shall be construed according to that sense and meaning. *Coit* v. *The Commercial Ins. Co.*, 7 J. R. 385; 8 Wend. 160; 1 Hall, 619; 10 Mass. 26.

The terms "stock in trade" as used in a policy are to have a liberal construction; and the meaning of the terms will vary according to the business to which they are applied. Thus, where the plaintiff was insured $1000, on his stock in trade, as a *baker*; and Held, that the policy protected every thing which was necessary for the carrying on of the plaintiff's business; and such ought to be the construction in all cases relating to the pursuits of mechanics. *Moandinger* v. *The Mechanic's F. Ins. Co.*, 2 Hall, 490. The stock of a merchant comprehends articles entirely different from the stock of a farmer; but the terms in all cases, apply to *personal* property only. ib.

Mem. clause.—The effect of the mem. clause in a policy is not to enlarge the perils underwritten against, but to exempt the insurers from certain losses, within those perils. *Potter* v. *The Suffolk Ins. Co.*, 2 Sum. R. 197.

(*a*) *Usurped power.*—The American as well as the English policies usually contain the following exception—"No loss or damage by fire happening by any invasion, foreign enemy, or any military or *usurped power* whatsoever will be made good by the company."

By the terms of the London Insurance Co., and some others, it is provided 'that they shall not be liable for any loss or damage happening by invasion, foreign enemy, or any military or 'usurped power' whatsoever. The words 'usurped power' would be applicable to an invasion of the kingdom by foreign enemies, or an internal armed force in rebellion pretending to assume the power of government. The terms do not extend to the acts of a mob riotously assembled, and therefore, where a malting-house was burned down by a mob at Norwich who had riotously assembled in consequence of the high price of provisions, the loss was held to be within the policy. *Drinkwater* v. *London Assurance Co.*, 2 Wils. 363. The Sun Fire Ins. Office has used words of a larger and more extensive import; for the proprietors of that company declare that they will not pay any loss or damage by fire happening by an invasion, foreign enemy, civil commotion, or any military or usurped power whatsoever. The words 'civil commotion' extend to an insurrection of the people for the purposes of general mischief; and on this ground, the firing of the premises of Mr. Langdale, the distiller, during the riots of 1780, was held not to be within the policy. Usurped power, says Lord Mansfield, in this case (*Langdale* v. *Mason*, Park, 657. Marsh. Ins. 794,) takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured. But what is a civil

commotion? It is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking away from every man, who was the object of their resentment, that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as well as if no witness had been produced. What was the object and end of this insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in Broad-street, St. Catherine's, in Coleman-street, at Blackfriar's-bridge, and at the plaintiff's. What is the object? General destruction—general confusion. It certainly was meant to aim at the very vitals of the constitution. It was not a private matter; to destroy all papists under a pretence or a cry of 'no popery.' The general object was destruction and confusion. The Fleet prison was burnt down; Newgate was burnt down the night before. The King's Bench prison is burnt, and all the prisoners set at liberty. The new Bridewell is burnt; the Bank attacked. Consider the consequences, if they had succeeded in destroying the Bank of England. The Excise and Pay Offices in Broad-street were threatened. Military resistance, and an extraordinary stretch, was made and justified by necessity. There was a great deal of firing; many men were killed; and the houses of a vast number of papists were burnt and destroyed. What is this but a civil commotion? No definition has been attempted to be given of what it is. It is said, that this is a civil commotion, distinct from usurped power and rebellion. It is admitted that this kind of insurance may amount to high treason, and, to be sure, it may. But the office do not put their expectation upon trying whether they were guilty of high treason or not. There is no manner of doubt but this was an insurrection for a grand purpose to take from a set of men the protection of the law. That is levying war against the King: there is not any doubt of it. It is not put upon that, but on the ground of a civil commotion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this case bring it within the idea of a civil commotion. I think a civil commotion is this, an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff. The jury, agreeably to the Chief Justice's directions, found for the defendants.

(*b*) *Civil Commotion.*—The Sun Fire Office introduced the exception "usurped power" above noticed in 1726, and in 1727 they added to the exception the words "civil commotion," thus providing against the effects of internal rebellion. The case of *Longdale* v. *Mason*, *supra*, decides that the words "civil commotion" extend to an insurrection of the people for the purpose of general mischief.

The New York policies contain also the words, "insurrection, riot, or civil commotion."

Remedy against the hundred.—In the case of a felonious setting fire to premises, a remedy was afforded by the Black Act against the inhabitants of the

hundred; (9 Geo. 1 c. 22,) and the provisions of this act have been since extended to other cases. (57 Geo. 3 c. 19. 3 Geo. 4. c. 33.) A party entitled to a remedy under the act against the hundred was held not to be deprived of his remedy, by having previously received the full amount of his loss from the insurance office. *Clarke* v. *The Inhabitants of the Hundred of Blythe*, 2 B. & C. 254. 3 D. & R. 489, S. C.

The principle is not peculiar to this subject for it has been held in the case of damage done to a ship, that the owner may recover from the underwriters for his own benefit first, and may afterwards sue the author of the damage in his own name for the benefit of the underwriters.

A learned writer (observes Ellis, p. 49;—) that "the words of the statute appear to indicate, that mere damage done to a house, (for example, breaking windows,) even by persons riotously and tumultuously assembled, will not give the remedy against the hundred, but there must be either a *demolition*, *pulling down*, or *destruction*, or such a *beginning* as would intimate an intention on the part of the rioters to *demolish*, *pull down* or *destroy*.

6. *Parol evidence to explain a policy.*

In commercial transactions, there are many cases in which evidence of custom and usage have been admitted to annex incidents to a written contract, 1 M. & W. 466. Thus, where an insurance was on a ship from London to the East Indies, warranted to depart with convoy, the Court held, that this clause of warranty must be construed according to the usage among merchants; that is from such places where convoys are to be had, as from the Downs. *Lethulier's* case, 2 Salk. 443. So, where the insurance is on goods till landed, and the defense is, that the plaintiff has been guilty of unreasonable delay in landing, the question can only be decided by knowing the usual practice of the trade, with which every underwiter is supposed to be acquainted, whether the practice has been recently or long established. *Noble* v. *Kennoway*, Doug. 510. *Vallance* v. *Dewar*, 1 Campb. 503. See *Smith* v. *Wright*, 1 Caines' 44.

On this principle, though the ordinary interpretation of an open policy of insurance would be, that it was merely to secure to the assured a bare indemnity, it has been held that evidence may be admitted to control it, by shewing a custom of merchants, that the assured should recover the gross freight, not deducting the charges for seamen and other expenses. 1 Bing. 61; Phil. Ev. 718. 5th Am. ed.

"Courts of law examine and hear witnesses as to the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which, though short, yet is understood by them, and must be the rule of construction." 1 Ves. 459; Phil. Ev. 739 (686) 5 Am. Ed. and the cases cited. And this principle is not confined to mercantile instruments. By Parke, J. 3 B. & Ad. 733. Usage is admitted to be proved to fix the sense of particular terms in an instrument, where they have acquired a peculiar meaning, as between the parties; its effect is not to alter the contract, but merely

to ascertain what that contract is. *Coit* v. *Com. Ins. Co.*, 7 J. R. 389; *Rankin* v. *The Amer. Ins. Co.* 1 Hall, 619. In *Dow* v. *Whetter*, 8 Wend. 160, the assured was allowed to show by extrinsic evidence the meaning of the word *proceeds* used in the policy. And where insurance was on the cargo of a brig valued at $600, and the question was whether the insurance covered live stock: Held, that it was proper to inquire of a merchant acquainted with the usage of the insurance offices in Baltimore in that particular. 2 G. & J. 136. There are many cases in which parties have been allowed to prove that particular terms made use of in the policies, and which have received no settled legal construction, have, among merchants and underwriters, a different meaning from that in which those terms are used in the ordinary transactions of life. Thus, the term *corn* in the memorandum articles has been held to include peas, beans and malt; but to exclude rice, on the evidence of commercial usage. Parke on Ins. 112. 5 B. & P. 213. So in the case of *Coit* v. *The Commercial Ins. Co.*, 7 J. R. 389, although it was admitted that Sarsaparilla was a *root*, within the general meaning of the term, yet the supreme court decided that parol evidence might be given to show that it was not understood by underwriters and commercial men as a root, within the meaning of the memorandum. In the case of *Astor* v. *The Union Ins. Co.*, 7 Cowen, 202, where the policy was on a cargo of *fur* and evidence was received to show that among dealers in such articles the word fur included bear skins, deer skins, &c. and that they were not included in the terms *hides* and *skins*, in the memorandum articles.

A commercial usage, having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it, is evidence of the intention of the parties, and illustrative of their agreement. By Hosmer, C. J. in *Barker* v. *Brace*, 3 Conn. R. 9. Here, it was proved to be the custom to stow gin on the vessel's deck, it was held that the storage in that place was proper.

Most of the usages of trade, have at some period, been proved as matters of fact, and when sufficiently established, they have grown into laws. By Washington, J. in 1 Pet. C. R. 231. And where the law upon the subject is settled, the court will not allow a contrary usage to be proved. 2 ib. 24. Usage is only resorted to where the law is doubtful and unsettled; and even then the construction of a clause must be determined by usage, and not by the opinion of the witnesses. ib.

The phrase *usage of trade*, implies a restriction to that class of merchants who deal in the article. Underwriters insuring by certain words, are bound to know the mercantile meaning of the words. *Astor* v. *The Union Ins. Co.* 7 Cowen, 202. A policy may be explained by showing a known usage of trade. *Coit* v. *The Com. Ins. Co.*, 7 John. 385, 390. But a local usage to affect the construction of a contract must appear to be so well settled, and of so long a continuance, as to raise a presumption that it was known to both contracting parties, and that the contract was made in reference to it. *Eager* v. *Atlas Ins. Co.*, 14 Pick. 141.

The reference to such local usage should appear by the terms of the con-

tract. ib. Such local usages are to be proved as facts, and necessarily by parol evidence. *Gordon* v. *Little*, 8 S. & R. 557; *Snowden* v. *Warder*, 3 Rawle, 103. The usage of commission merchants in respect to insurance of property consigned for sale, may be shown by parol. *De Forest* v. *The Fulton Fire Ins. Co.*, 1 Hall, 84. It is clearly competent for them to show the course of trade in which they are engaged, and that it is a part of their business as factors, to effect insurance on property in their hands, without express orders to that effect given by the consignors.

The rule for admitting such evidence of usage must be taken with the qualification, that the evidence proposed is not repugnant to or inconsistent with the contract. Therefore, in an action on a policy of insurance, "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been admitted, that by the custom of the trade the risk on the goods, as well as on the ship, expired in twenty-four hours, the court of King's Bench granted a new trial on that ground, and on the new trial the evidence was rejected. *Parkinson* v. *Collier*, Park Insu. 416. Evidence of usage of trade, which contradicts the express words of a contract, is clearly inadmissible. Phil. Ev. 5th Am. Ed. 769. A usage can never be set up to affect or vary an express agreement; nor to contradict a rule of law. *Frith* v. *Barker*, 2 J. R. 335; *Homer* v. *Dorr*, 10 Mass. 26. In the case of *Rankin* v. *The Amer. Ins. Co.* of N. Y., 1 Hall, 619, it was held that evidence of a usage controlling the construction of the policy, so as to render necessary the production of a particular document as a part of the preliminary proofs was not admissible. So evidence of mercantile usage that damage by rats was within the meaning of the words "perils of the seas" was rejected.

In *Homer* v. *Dorr*, 10 Mass. 26, the insurance was on property laden on freight from Boston to Archangel and back to Boston, taking the risk on shore as well as on board; in an action sued to recover the premium note, it was *held*, that the whole note was recoverable, although no property was returned in the ship; and although it was proved to be the general usage in Boston, where the insurance was effected, to return a portion of the premium. The usage of no class of citizens can be sustained in opposition to principles of law. Though the rule of deducting one third new of old probably originated in usage; yet, it has been so long known and settled in the commercial world, and has been adopted in courts, so that now it is a well settled principle of law. *Eager* v. *Atlas Ins. Co.*, 14 Pick. 141. To allow particular usages to control or vary the construction and legal effect of a written contract would be repugnant to the rules of evidence, and might be followed by perilous and mischievous consequences. Courts take no notice of these particular and local usages; they are to be proved like other facts, and necessarily by parol evidence. Per Shaw, C. J., in ib. *Gordon* v. *Little*, 8 S. & R. 557; *Snowden* v. *Warder*, 3 Rawle, 103; *Smith* v. *Wright*, 1 Caines, R. 44; *Halsey* v. *Brown*, 3 Day, 346. When the contract in the policy refers to "the customs and rules of insurance" in a particular place, and specifies how far they shall be a part of the contract, it must be inferred that the parties did not intend that it should be affected thereby beyond the extent specified; especially where it

appears that the form of the policy was settled and adopted with great care and deliberation. Per Shaw, C. J., in *Eager* v. *Atlas Ins. Co.*, *supra*. Local usages can never be suffered to prevail so as to sap the foundation of a well established rule of law. ib. They can have no effect upon any contract, unless by the consent of the contracting parties, either express or implied. ib. A usage with respect to policies was found in the special verdict to prevail among underwriters subscribing policies at Lloyd's coffee-house in London, and merchants and others effecting policies there, and that the policy in question was effected at Lloyd's coffee-house, but it was not found that the plaintiff was in the habit of effecting policies at that place: *Held*, that this usage was not sufficient to bind the plaintiff. *Gabay* v. *Lloyd*, 3 B. & C., 793. *Scott* v. *Irving*, 1 B. & Ad. 605.

In an action on a policy on buildings in Mobile, evidence to prove, that it was the usage *at New York* where the policy was effected, in case of the occurrence of any circumstance by the act of the assured, after effecting the insurance, whereby the risk is increased, for the assured to give notice thereof to the insurer, who is then to have the option of continuing the policy, or of annulling it, was rejected, on two grounds, 1st, that the usage offered to be proved was a *local* one, applying only to insurances on property, in the city of New York; and 2dly, that if it were a general usage, it could not be given in evidence to alter the legal operation and effect of the policy. *Stebbins* v. *The Globe Ins. Co.*, 2 Hall, 632. Oakley, J. said:—"It was not offered to explain the meaning, or extent of any stipulation expressed in the contract, but with a view to introduce into it, an entirely new and distinct condition. Therefore, the usage *at New York*, as to alterations or additions to the buildings insured whereby the risk is increased, that the insured must give notice, so that the insurer may at his option annul or continue the policy, is a local usage and cannot be considered as having any effect upon an insurance in the city of Mobile. ib.

Where a vessel is stranded, the master can sell only in a case of necessity; and a usage to sell without necessity would be void. *Bryant* v. *Com. Ins. Co.*, 6 Pick. 131.

Evidence of usage is not admissible to explain the construction of a policy of insurance, in the parts written by the parties as well as in the printed form. *Preston* v. *Greenwood*, 4 Dougl. 28.

In an action on a policy in the usual form on ship, boat, &c. evidence of usage that the underwriters never pay for the loss of boats on the outside of a ship, slung upon the quarter is inadmissible. *Blackett* v. *The Royal Exchange Assu. Co.* 2 C. & P. 244; 2 Tyr. 266.

Policies are sacred things, and a merchant should no more be allowed to go from what he has subscribed in them, than he who subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on condition, &c. when it may be that the bill has been negociated; for though neither of them are specialties, they are of great credit, and much for the support and advantage of trade. By Lord Ch. J. Pemberton, in *Kaines* v. *Knightly*, Skin. 54, S. C. referred to in *Bates* v. *Graham*, 2 Salk. 444

but mis-stated. In the case first mentioned, the defendant in an action on a policy of insurance from Archangel to Leghorn attempted to shew, that the agreement before the subscription of the policy was, that the adventure should begin only from the Downs, but the Court would not admit the evidence. The same rule of course applies to charter parties. In a case where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth. *Leslie* v. *De la Torre*, cited 12 East, 583.

The contract of insurance is to be construed by its own terms expressed in the policy, and it cannot be varied by parol proof. *The N. Y. Gas Light Co.* v. *The Mechanics F. Ins. Co.* 2 *Hall*, 108. See also *Thompson* v. *Ketcham*, 8 J. R. 189. The terms of the contract as expressed in the policy are to be taken as evidence of the contract; and hence all conversations or memorandums which are not annexed or inserted in the policy; all proposals made or conversations had before the subscription, inconsistent therewith, are to be considered as waived. *Higginson v. Dall*, 13 Mass. 99. The declarations of the parties, *it seems*, made at the time of the execution of the policy are inadmissible, *ib. Whitney* v. *Haven*, 13 ib. 172. But a condition or undertaking implied may be superseded by a verbal statement. *Parks* v. *General Int. Assu. Co.* 5 Pick. 34; *Van Ness* v. *City of Washington*, 4 Pet. R. 232.

Parol evidence is admissible to show who was intended to be insured by the words *for whom it may concern, or on account of the owners;* for this is only reducing to certainity that which is left uncertain by the policy. *Catlett* v. *Pacific Ins. Co.* 1 Wend. 561; 4 ib. *S. C. Murray* v. *The Columbia Ins. Co.* "J. R. 311; Marsh. on Insu. 682, 710, 760; *Lawrence* v. *Sebor*, 2 Caines, 203. The words "owners of the brig Sampson" are words of description of the persons interested. And where the insurance is on property generally, it may be shown by parol that the plaintiffs intended that the policy should cover separate or joint property, or both. *Foster* v *The United Ins. Co.* 11 Pick. 85.

Representations which are material to the risk may be shown to avoid the policy. 13 Mass. 100. The application for insurance is not admissible for the purpose of showing the intention of the parties, the policy itself bring the best evidence of the agreement of the parties *Dow* v. *Whetten*, 8 Wend. 160.

Where in the margin of a policy on a ship at sea, it was written that she had been spoken with on the 27th Aug. parol evidence that a *mem.* was left with the insurers, with which it was intended the policy should conform, stating that it had been spoken with on the 20th, and that the 27th was inserted by mistake, was held to be inadmissible. *Ewer* v. *Washington Ins. Co.*, 16 Pick. 502.

The opinion of a person conversant with the business of insurance, on the question whether a premium would have been insured by the communication of particular facts, has been thought admissible as judgment in a matter of trade. *Berthon* v. *Loughman*, 2 Stark R. 258. But the reception of this evidence, though sanctioned by the decision of the Court of King's Bench, in the case of *Rickards* v. *Murdock*, and in some degree by the court of Common Pleas, in the case of *Chapman* v. *Walton*, 10 Bing. 57, is opposed to the opinion of Lord Mansfield, expressed in the case of *Carton* v. *Boehm*, ib., and of

C. J. Gibbs, in the case *Durrell* v. *Bedelry*, Holt's R. 283. It was also discountenanced by Lord Kenyon. The conflicting decisions were cited, but the Court of King's Bench decided in the late case of *Campbell* v. *Rickards*, 5 B. & Adol. 840, that such evidence was inadmissible. "Witnessess," said Lord Denham, "conversant in a particular trade, may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another. We think the jury are to decide on the materiality of facts, and the duty of disclosing them." The case of *Chapman* v. *Walton*, *supra*, does not appear to have been cited, though it appears to have been decided in the previous term, it was probably not reported. It was an action against a policy broken for negligence in not effecting a policy in the proper form, it appeared, that a valid policy had been originally effected, but alterations in the voyage were afterwards made and communicated to the plaintiff, which letter he transmitted to the defendant, as instructions, that corresponding alterations might be made in the policy; some alterations were, in consequence, procured by the defendant, but not sufficient to make the policy cover the altered voyage; it was held, that the opinion of brokers was admissible as to what was the duty of the defendant under the circumstances. "That," said Tindal, C. J., in delivering the judgment of the Court, "is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz. whether other persons exercising the same profession or calling, and being men of experience and skill therein, would, or would not, (upon reading the letter,) have come to the same conclusion as the defendant." It is to be observed that this decision professes to proceed in some degree on the two cases which were overruled in *Campbell* v. *Rickards*, decided in the Kings Bench in the following term, viz. *Barthon* v. *Loughman* & *Rickards* v. *Murdock*. See Phil. ev. 5 Am. ed. p. 899 *et seq.*

Policies cannot be contradicted, or varied, by any antecedent written agreement of the parties, or by parol evidence of what passed at the time of effecting the policy. *Lewis* v. *Thatcher*, 15 Mass. 431; *Wilson* v. *Hanson*, 3 Fairf. R. 58. Where there is a written contract, that must be abided by. The written *date* however is not conclusive evidence of the time of the transaction. This, when controverted and material, may be proved by extraneous evidence. *Lee* v. *Mass. Fire & M. Ins. Co.*, 6 Mass. 219.

Although policies of insurance are not technically specialties, not being under seal, they have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence, which govern in the case of specialties. The policy itself is considered to be the contract between the parties; and whatever proposals are made, or conversations had between the parties prior to the subscription, they are to be considered as waived if not inserted in the policy or contained in a memorandum annexed to it. Per Parker, C. J., in *Higginson* v. *Dall*, 13 Mass. 96. Representations however of the state of the vessel, and giving a description of the voyage, may be proved by

oral or written testimony, when the object is to falsify those representations; for many things material to the risk are stated in the application for insurance, which are not usually made a part of the policy; and it is a part of the law of insurance, that such representations may be so proved. ib. Warranties however must always be inserted in the policy, as also any agreements as to the policy being vacated on the happening of any event agreed on by the parties. ib.

7. *Renewal of Policy.*

When the time for which the insurance was effected has expired and there is a provision in the policy that it may be renewed within a stipulated time: yet, it is necessary in order to render the continuance of the policy effectual, that the premium should be paid and accepted by the underwriters. The effect of such a contract, is only to give the assured an option to continue the insurance by paying the premium, at the time if the office should agree to accept it. *Salvin* v. *Jones*, 6 East, 571.

A policy under seal contained a clause for its renewal without any charge for the policy by the payment of the premium:—Held, that an indorsement merely on the back of the policy was not such a renewal as would authorize the insured to sue an action of covenant for the breach of the contract:—*It seems*, however, that a different action would be sustained. *Luciani* v. *American F. Ins. Co.*, 2 Wharton, 167. The payment of the premium in such case, has precisely the effect of an order to insure, and no more. By Gibson, C. J. in ib.

CHAPTER VI.

WARRANTY, AND THE NATURE OF WARRANTIES.

THE doctrine of warranties has been a more frequent subject of discussion in cases of marine policies, but so far as it is applicable to the subject, the doctrine of warranties is equally applicable to fire insurance. A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent, and as applicable to fire policies is usually of an *affirmative* nature, as that the property insured is of the nature described in the policy. (Ellis, p. 27, 28.)

A breach of warranty will avoid the contract. The meaning of a warranty to preclude all questions whether it has been substantially complied with or not. If it be affirmative, it must be literally true ; if promissory, it must be strictly performed. The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceed from fraud, negligence, misinformation, mistake of an agent, (unless the agent of the insurers,) or any other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity. The only question is, whether the thing warranted has taken place or not, or be true or not. If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty. Ellis, p. 28; See Ld. Mansfield's observations, *Hibbert* v. *Pigou*, 2 Park., 498; Marsh. on Ins. 375. Ld. Eldon's observations, *Newcastle F. Ins. Co.* v. *Macmoran*, 3 Dow. P. C. 255.

An express warranty being in the nature of a condition precedent, it must appear on the face of the policy ; therefore instructions in writing for effecting the policy, unless inserted in the instrument itself, do not amount to a warranty, *Pawson* v. *Barnevelt*, Dougl. 12, n., but only to a representation, upon which the doctrine differs, as will hereafter be seen.

When a slip of paper describing the state of a ship, the particulars of the voyage, &c. was *wafered* to a policy at the time of subscribing, Ld. Mansfield held that this was not a warranty, or to be considered a part of the policy, but only a *representation; Bize* v. *Fletcher*, Dougl. 12, n., and where evidence was offered to prove that a written memorandum inclosed in the policy was always *among merchants* considered as a part of the policy, Ld. Mansfield held, that whether this was or was not a part of the policy was a question of *law* and therefore that such evidence could not be received, and that a written pa-

per, by being *folded* up in the policy, did not become a warranty. *Pawson* v. *Barnevelt*, Dougl. 12; 1 Marsh. 356.

But it is sufficient that the warranty appear on the *face* of the policy, although not written in the body of it. If it be written in the margin, either in the usual way, (*Bean* v. *Stupart*, Dougl. 11,) or transversely, (Per Ld. Mansfield in *Kenyon* v. *Berthon*, Dougl. 12, n.,) it being part of the written contract when signed, it will be a good warranty.

Although the language of the Judges in many cases has been that a warranty in a policy must be literally complied with, it has been held that a warranty to *sail* on a particular day was complied with, although the wind blew so that a sail could not be raised, and the master knew it was impossible to get the vessel to sea on that day, by his merely warping the vessel a little further down the river for the *bona fide* purpose of starting on the voyage insured, and putting the vessel in a better situation to proceed on her voyage to the port of her destination as soon as the wind would permit her to go to sea. *Cochrane* v. *Fisher*, 2 Cr. & M. 581; 5 Tyrwhitt's R. 496, S. C. on error. The latter court held, that a literal compliance with the warranty to *sail* on that day, was not necessary, if the vessel was, *bona fide* and in fact, started upon her voyage by warping her down the river upon the day specified in the warranty.

It is a first principle of the law of insurance that when a thing is warranted to be of a particular nature or description it must be *de facto* that which was insured. However, it would be a sufficient answer, that the mistake or misrepresentation was to be attributed solely to the insurers themselves or their agent. 3 Dow. 255. Where the misdescription is not material as not affecting the rate of insurance—an agricultural building was described in a policy as a barn, though it was not strictly so:—Held, that the policy was not vacated. M. & M. 90.

In *Fowler* v. *The Ætna Ins. Co.*, 6 Cowen, 673, the policy was on the stock in trade of the plaintiff, described as being contained in a two story framed house filled in with brick. It appeared in evidence, that the house was a wooden building with hollow walls, and not filled in with brick. Held, that the description was a warranty, and being a condition precedent, must be fulfilled by the assured, to entitle him to sustain an action on the policy, and negligence, mistake, or misrepresentation, would not excuse his failure in the strict performance of the condition, or entitle the plaintiff to recover. This case then, goes to establish the principle, that a misdescription in the body of the policy will vitiate the contract, whether it be fraudulent or not. A case in the House of Lords, (3 Dow. 255,) also held a warranty, being a condition precedent, whether it was material to the risk or not, was of no importance. And Lord Ch. Eldon distinguished between representations and warranties, stated it, as a first principle of the law of insurance, that a representation is open to inquiry into its materiality, and that if it should not be material, its inaccuracy, or a deviation from the tenor of it, may be excused; but that when there is a warranty, it is a part of the contract that the matter is such, as it is represented to be; and the materiality or immateriality, is, therefore, a matter of

indifference, the only question being as to the mere fact which is affirmed or represented to exist. Although that case fully carries out the principle of a literal and strict compliance with a warranty; yet, it in no respect relaxes, but in effect confirms the rule, that a representation or assurance, to impress it with the character of a warranty, must be incorporated in the contract, and compose part of the agreement between the parties.

In the case of *Higginson* v. *Dall*, 13 Mass. 96, a written memorandum signed by the plaintiff, and delivered by his agent to the broker at the time of the application for insurance, stating among other things, that the policy was to take effect if the vessel should sail with a cargo, and no insurance be made by the plaintiff elsewhere, was offered in evidence as a warranty to show that the policy was void in consequence of an insurance made by the plaintiff abroad. The memorandum was not annexed to the policy, nor was the matter it contained, inserted in the contract; but the defendant offered to prove by the broker, that it was kept with the policy, and shown to the several underwriters before they subscribed the contract. The memorandum, though objected to as incompetent, was admitted by the Judge at the trial. But the court held, that it ought not to have been admitted, for the purpose for which it was offered. The principle of that decision was, that the policy itself is the contract between the parties, and that the proposals, statements and conversations which passed between them, prior to the subscription, are to be considered as waived, if not inserted in the policy. It was admitted, that representations which do not appear on the face of the contract, but are often, though not always, contained in the application for insurance, may, when they are material to the risk, and the object is to falsify them, be proved by oral or written testimony; but it was held that warranties must always be inserted in the policy.

Phillips in his *Treatise on Insurance*, (p. 125,) qualifies the general rule, by saying, that a warranty may be contained in documents, expressly referred to in the policy, and so made a part of it. Upon this Mr. J. Oakley, 2 Hall, 627-8, observes thus:—"This qualification, or rather extension of the rule, rests upon the case of *Routledge* v. *Burrell*, 1 H. Bl. 254, and *Worsley* v. *Wood*, 6 T. R. 710. On referring to these cases, it will be found, that the policies on their face, contained an express stipulation that the insurers were to be liable, *according to the exact terms of their printed proposals.* It was necessary, therefore, to resort to those proposals, to ascertain the terms of the contract, and without such reference, the contract itself would be unintelligible. In such a case, no doubt the proposals, thus referred to, may be considered as incorporated in the policy, and as making part of it."

The insurers having a description of the property in their possession, are presumed to insert in the policy, as much of that description as they deem material, and by omitting any part of it, they show that they are content to take such part as a representation merely, and to look to it but for the purpose of estimating the risk. ib.

In *Delonguemare* v. *The Tradesman's Ins. Co.*, 2 Hall, 589, the first condition annexed in the policy, provides that applications for insurance on property out

of the city of New York, must be in writing, and contain a description of it, and that if any person shall describe the same, otherwise than it really is, *so that it be insured at less than the rate of premium specified in the printed proposals of the company*, the insurance shall be void.

It is clear, that such a representation cannot be converted into a warranty, by a mere reference to it, in the body of the policy, without losing sight of the object for which it is required by the company to be made. Every policy contains such a general reference. It is a part of the printed clause of the instrument, and could never have been intended, to convert into an express warranty, with all its legal consequences, a document which the company required to be furnished only as a representation.

The doctrine of warranty in the law of insurance is one of great rigor; the warranty must appear on the face of the policy in order to avoid the contract. A misdescription of a building in the application if it do not amount to such as to affect the rate of insurance, or change the actual risk, it can scarcely be deemed *material*, and if such variation were not fraudulently intended, it is no breach of contract. The *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72. A false representation is not a breach of the contract, but if it be material, it avoids the contract. 10 Pick. 535. There, plaintiff represented the house insured as his property, and his property was in right of his wife, and in common with her sister: and Wilde, J. observed—"It is true the representation was not strictly accurate and full; but a representation may be so, if fairly made, and true in substance, without vitiating the policy. A mortgagor may represent the estate mortgaged as his property, although the legal estate is in the mortgagee.

So inflexible is the rule, that a representation to have the effect of a warranty, must be a part of the contract, and appear on the face of the policy; it is not sufficient, that written instructions for effecting the insurance, a written memorandum inclosed and folded up in the policy, or a slip of paper annexed to the policy, at the time of subscribing it, have been held, not to amount to a warranty. Per Jones, C. J., in 2 Hall, 589. Therefore, where the description of the room, which was supposed to represent it as devoted exclusively to the storage or deposit of the finished ware, and which was insisted on as a warranty, did not appear in the policy, but was found in the report of the surveyor, or in the application of the insured, which made no part of the policy. The policy referred to the survey, and it referred also, to the report of the surveyor, but it incorporated neither of them into the contract: Held, that they did not amount to a warranty. ib. And Jones, C. J. observed that "in all the cases, where a warranty has been held to arise from the description of the subject, or the expressions of the parties, that description, or those expressions, have appeared on the face of the policy. No authority has been shown for extending the rule to descriptions or expressions contained in other documents to which the policy may refer; and such an extension of the rule would, I think, be unwarrantable, unless the reference to the collateral writing be such as to clearly make it a part of the contract. It was on this latter ground, that in policies against loss by fire, the obligation imposed on the as-

sured by the printed proposals annexed to the policy, to procure the certificate of the minister, or church-wardens and parishioners, of the reality of the loss, and the fairness of the claim, has been held to be a condition precedent to the right of the assured to recover, which cannot be dispensed with, though the certificate be wrongfully withheld; for the policy, in such cases, not only refers to the writing which is attached to it, but the express undertaking of the insurer is to pay the loss according to the exact terms of the printed proposals. They are consequently made a part of the policy."

These cases have been referred to with approbation by Chancellor Kent, 3 K. C. 373. In *Dow* v. *Whiton*, 8 Wend. 166, the Chancellor observes, that the policy itself is the only legal evidence of the agreement between the parties. Vice Ch. M'Coun also, (1 Edw. 74) states the difference between a warranty and a representation :—The former is the affirmation of a fact asserted in the policy, and forming a condition which must be strictly complied with; the latter the statement of some collateral circumstances not embodied in the policy, though made before the contract was completed.

The same doctrine was affirmed in *Snyder* v. *Farmers Loan Co.*, 13 Wend. 92, where the plaintiff was insured a certain sum on his goods "in the stone building with shingle roof, occupied by himself and others, situated at, &c. more particularly described in application and survey furnished by himself, filed No. 928, in this office." The Judge charged the jury that the *survey* was not a part of the policy so as to become a warranty; the misdescription of the building in regard to the partition wall was not in itself a bar to the action; it was for the jury to say whether there was a fraudulent representation or concealment in regard to the survey; or whether the risk was enhanced by the facts misdescribed; and the jury having found for the plaintiff, the court refused a new trial saying—"It is not necessary to deny that a separate paper may by *express stipulation* be made a part of the policy; but there is no such reference in the present policy as to authorize the court to give the survey the force of a warranty; indeed from the manner of referring to it, it would seem that the defendants were satisfied to look to it only for the purpose of estimating the risk. It is not pretended that the judge did not present the question of fraud fairly before the jury. The only question which we decide now is, that the survey referred to in the policy must be considered a *representation* merely, and not a warranty."

In the same case on error (16 Wend. 481), the Chancellor makes the following observations:—"A marine policy is anomalous in form, though in other respects it is to receive the same construction as other contracts. Hence it has been correctly held that a stipulation, or clause or memorandum, as it is sometimes called, although written in the *margin*, on the *back*, or on any other part of the same paper, if made before or at the time of the underwriting of the policy, and intended as a part thereof, is considered as a part of the contract itself in the same manner as if inserted in its proper place, in the form of a stipulation or agreement, in the body of the policy. This accounts for the different decisions of Lord Mansfield in the cases of *Bean* v. *Stupart*, 1 Dougl. 11, and *Kenyon* v. *Berthon*, referred in a note to

the last case, in both of which he held stipulations written upon the policy itself as strict warranties, and in the cases of *Rawson* v. *Barnevelt*, and *Bize* v. *Fletcher*, referred to in the same note; in the first of which he held that a written memorandum inclosed in the policy, and shown to the underwriter at the time of his signature, was not a strict warranty, but a representation merely; and in the last he held the same as to a memorandum, upon a separate piece of paper, but which was actually attached to the policy by a wafer at the time the policy was underwritten. I have no doubt that it is perfectly competent for the underwriters, by the insertion of a stipulation to that effect in the policy itself, to give to a statement of facts contained in a separate paper or instrument, sufficiently referred to and identified, all the effect of an express warranty inserted in the body of the policy. But in the anomalous and informal instrument called a marine policy, many things have been construed into express warranties, which, if found in other contracts, would be perfectly unintelligible, or would be construed as immaterial matters; and the cases above referred to show that the principle of converting every thing contained in a policy into an express warranty, although there is nothing in the form of the memorandum itself to show that such was the intention of the parties to the contract, is not to be extended to any memorandum or paper writing not contained in the policy itself, or written upon the same paper with the policy so as to be considered as contained therein. This I take to be the settled law in relation to *marine insurances*; but I confess I have doubts whether the principle of construing every matter of mere description contained in the body of the policy, although not material to the risk, into an express warranty which is to be complied with, should be applied with the same strictness to *fire policies*, where the misdescription is most generally the mistake of the underwriters own surveyor.

The policy provided, that if the building insured should, at any time during the continuance of the policy, be appropriated, applied or used, to or for the purpose of carrying on, or exercising therein, any trade, business or vocation, *denominated hazardous, or extra-hazardous, or specified in the memorandum of special rates in the proposals annexed to the policy*, or for the purpose of *storing therein*, any of the articles, goods or merchandise, in the same proposals denominated hazardous or extra hazardous, or included in the memorandum of special rates, the policy should cease, and be of no force and effect: Held, that as the trade or business of a *grocer* was not mentioned in the proposals annexed to the policy, it was not prohibited; and consequently the ordinary incidents of that business were allowable—such as keeping *spirituous liquors, oil, &c.* *N. Y. Equitable Ins. Co.* v. *Langdon*, 6 Wend. 623; See also *Luckley* v. *Furse*, 15 J. R. 342; and *Kensington* v. *Inglis*, 8 East, 273. The enumeration of certain trades or kinds of business, as prohibited on the ground of being hazardous, is an admission that all other kinds are lawful under the contract. *N. Y. Equitable Ins. Co.* v. *Langdon*, *supra*, and *Baker* v. *Ludlow*, 2 Caines, 288. In the latter case, *dried fish* were enumerated in the memorandum clause as free from average, *and all other articles perishable in their own nature.* It was held that the naming of one description of fish implied that

other fish were not intended ; and that the subsequent words, " *all other articles perishable in their own nature,*" were not applicable to the articles previously enumerated, and did not repel the implication arising from the enumeration of them. In *Doe* v. *Lanning*, 4 Camp. 76, 7, Ld. Ellenborough held, that a *coffee house* was not an *inn*, within the meaning of a policy of insurance against fire, enumerating the trade of an *inn-keeper*, with others, as double hazardous, and covered by the policy.

Where the policy prohibits the use of the building for the purpose of *storing therein* :—Held, that keeping articles to retail as a grocer was not a *storing therein* within the meaning of the policy. *N. Y. Equitable Ins. Co.* v. *Langdon, supra.*

In *Duncan* v. *Sun F. Ins. Co.*, 6 Wend. 468—" gunpowder is not insurable, unless by special agreement" were contained in *proposals* annexed to the policy and at the bottom of the *extra-hazardous* clause, in an enumeration of goods *not hazardous*, and of goods, &c. hazardous and *extra-hazardous* : Held, that gunpowder was included in *extra-hazardous* ; but as the building was allowed to keep extra-hazardous goods, the storage of gunpowder in it did not avoid the policy.

Warranties must always be inserted in the policy and constitute a part of the contract. *Higginson* v. *Dall*, 13 Mass. 96. Here, a written memorandum signed by the plaintiff, and delivered by his agent to the broker at the time of the application for insurance, stating among other things, that the policy was to take effect if the vessel should sail with a cargo, and no insurance be made by the plaintiff elesewhere, was offered in evidence as a warranty to show that the policy was void in consequence of an insurance made by the plaintiff abroad. The memorandum was not annexed to the policy, nor was the matter it contained, inserted in the contract; but the defendant offered to prove by the broker, that it was kept with the policy, and shown to the several underwriters before they subscribed the contract. The Court decided that the memorandum was incompetent evidence to prove a warranty. The principle of this decision is, that the policy itself is the contract between the parties, and that the proposals, statements and conversations which passed between them, prior to the subscription, are to be considered as waived, if not inserted in the policy. The same principle was settled in *Delonguemare* v. *The Tradesman's Ins. Co.*, 2 Hall 580, where the description of the room in question, as a store room for painted ware, was contained in the application for insurance, or in the report or survey made upon the buildings insured; but it did not appear in the policy itself, nor was the report or survey, or the application containing it, annexed to the policy. It was therefore held not to be a warranty.

CHAPTER VII.

OF MISREPRESENTATION AND CONCEALMENT.

I. *Of Misrepresentation.* When a warranty is inserted in a policy, it forms an express condition, and must be expressly complied with. A representation, on the other hand, not embodied in the policy, will not vitiate it, although erroneous, if it be fairly and substantially true, and does not prejudice the insurers. *Farmer's Ins. & Loan Co.* v. *Snyder*, 16 Wend. 481.

Where there is a condition precedent on a warranty in a policy of insurance, it is of no consequence whether the thing waranted, or to be perform ed, is material to the risk or not, if not performed. The defendant has a right to say *non in haec in fœdere veni.* Sutherland, J. in 12 Wend. 460; *Fowler* v. *Ætna F. Ins. Co.* 6 Cow, 673; *Duncan* v. *The Sun F. Ins. Co.* 6 Wend. 488; 7 Cowen, 649; *Cornell* v. *Le Roy*, 9 Wend. 163 and *cases cited;* 19 J. R. 72; 6 Cowen, 624.

The legal and commercial meaning of the term *misrepresentation* as used in the condition of a fire policy, which declares that if any person insuring a building or goods shall make any misrepresentation or concealment &c., the insurance shall be void, is, that it must be a misrepresentation of a matter material to the risk, either designed or otherwise. Per chancellor in *Farmer's Ins. & Loan Co.* v. *Snyder*, 16 Wend. 480, 488.

In New York, fire insurance companies make a general classification of hazards in reference to the materials and construction of the buildings insured, or in which the subject matter of the insurance is deposited or kept, and in reference to their location and the manner in which they are occupied, and their rates of premium are usually regulated accordingly. A false or mistaken representation, therefore, from which the underwriters might be induced to suppose that the risk belonged to a lower instead of a higher class of hazards, would, if caused by the fraud or even mistake of the assured or his agents, be sufficient to avoid the policy, ib. But in reference to all matters of minor importance, such as whether the building is a few feet more or less from an adjacent building, or whether the rooms, partitions, stair cases, &c. are precisely as stated by the party insured, it must always be a mere question of fact to be determined by the jury whether the misrepresentation be fraudulent or materially varied the nature of the risk, to the prejudice of the insurer; unless the underwriter thinks proper to put it in the shape of a warranty, and thus make it a part of the contract that the assured shall not be paid his loss if there be any, even an unessential variance from the description of the property or its location as to the buildings, &c. ib.

In Macmoran & Co. v. *Newcastle F. Ins. Co.* 3 Dow. 255, the policy was in these terms :—"Whereas Mr. Hugh M'Moran & Co., &c., have paid the sum of 21*l.* 5*s.* 8*d.* to the society of the Newcastle—upon—Tyne Fire Office; and do agree to pay, or cause to be paid, to the said society, at their office in Newcastle—upon—Tyne, the sum of 17*l.* 17*s.* on the 24th day of June, 1806, and the like sum of 17*l.* 17*s.* yearly, on the 24th day of June, during the continuance of this policy, as a premium for the insurance from loss or damage by fire, of £50 on mill-wright's work, including all the standing and going gear in their mill, which is used as a cotton and woolen mill, situated at Garschew, being in their own occupation only, and stone built and slated; £550 on cloth-maker's work, carding and breaking machines, and all moveable utensils in the first floor, occupied as a woolen mill; and £350 on stock of wool in the same:" then followed this very material passage, "warranted that the above mill is conformable to the first class of cotton and woolen rates delivered herewith."

"But that case observes Ch. J. Jones (2 Hall 614, 615,) which so fully carries out the principle of a literal and strict compliance with a warranty, in no respect relaxes, but in effect confirms the rule, that a representation or assurance, to impress it with the character of a warranty, must be incorporated in the contract, and compose part of the agreement between the parties.

"The warranty upon which the decision of the court turned, was embodied in the policy, and constituted part of the contract. No recurrence was had to extrinsic evidence, or to any collateral document or writing to establish it. The printed proposals to which the policy refers, as delivered with it, was not resorted to or used as proof of the warranty, but as an item of evidence, to show the mere compliance of the warrantor with his engagement, by showing that the mill was not of the class to which it was warranted, by the policy, to belong. It was because the assured had permitted the mill to be represented in the policy, as being conformable to the first class of cotton and woolen rates, and had accepted the contract with that condition in it, that he was held bound to establish the fact without regard to its materiality, and disabled by his own compliance with the condition, notwithstanding the extenuating matters shown in excuse of his failure from enforcing his contract against the company."

In the case of *Delonguemare* v. *The Tradesman's Ins. Co.* 2 Hall, 589, a description of the room in question, as a store room for painted ware, was contained in the application for insurance, or in the report or survey made upon the buildings insured; but it did not appear in the policy itself, nor was the report or survey, or the application containing it annexed to the policy. It was, therefore, held not to be a warranty; but that it might on the general principles of insurance, taken to be a representation; and, considered in that light, if material and falsified, it would vitiate the insurance. Jones, C. J. observes (p. 611):—"This brings us to the next branch of the defense, which is, that if the description of the building was not a warranty, it was a representation, and the room in question being represented as a room for the storage or deposite of finished painted ware, and not being so occupied at the time

of effecting the insurance, but then being used as a carpenter's shop, and that fact not being communicated to the insurers, there was a material misrepresentation or concealment, and the policy, for that reason, did not attach, and the Judge should, for that cause, have nonsuited the plaintiff.

"It is conceded that a representation, if it be not fraudulent, and does not tend to increase the risk of the insurer, will not avoid the policy, but that it will be sufficient to comply with it in substance, or to show that it has not been departed from, to the material injury of the insurers. I assume that the plaintiff did represent the room, on the smaller plan or survey, which I take to be his application for insurance, as intended for a store room for the reception of the painted ware when finished, and I assume, that this representation, whether the plan in which it appeared was the application for insurance, or a survey of the building, was before the insurers when they took the risk, and may have entered into their estimate of the rate of premium. And the question on these assumptions will be, whether the occupancy of that room by the carpenter, with his materials and tools, as disclosed by the evidence, did materially falsify the representation and increase the risk of the insurers? The proof of its materiality was upon the underwriters, who make the defense. I discover no evidence in the case of the point; and the failure of proof is decisive against the objection. The risk incurred, by the occupancy of that part of the building by the carpenter, if it in reality did enhance the risk, was susceptible of proof, and it was indispensably necessary to show it, in order to render the defense available. Unless, therefore, the necessity of extrinsic and oral proof of this fact was superseded, or the absence of such proof was supplied by the internal evidence deducible from the policy, or its accompanying conditions of insurance, this ground of defense cannot prevail.

And Mr. J. Oakley in the same case observes: "The general question arising on this bill of exceptions, is whether a description filed in the office of an insurance company, and referred to in the policy, in general terms, as a report of the situation of the premises insured, is to be considered as incorporated in the policy, and as constituting a strict warranty. If so, it follows, from the established doctrine on the subject of warranties, that any variation, in the actual situation of the premises, from the description, renders the policy void, though it be immaterial, or the mere result of accident or mistake.

"Assuming that the same rules of construction are to be applied to fire, as to marine policies, in determining what shall constitute a warranty, and what shall be a representation merely, the general principle seems to be well settled, that an express warranty must appear on the face of the policy, and that any instructions for insurance, unless inserted in the instrument itself, do not amount to a warranty. (1 Con. Marsh. 349. 451. *Pawson* v. *Watson*, Cowp. 785. 2 Caines, 142. 3 Kent's Com. 235.) Thus it has been held, that a paper wrapped up in the policy, when presented to the underwriters, or annexed to it by a wafer, does not constitute a warranty; (Doug. 11, notis;) and Phillips, in his Treatise on Insurance, (p. 125,) qualifies the general rule, by saying that a warranty may be contained in documents, expressly referred to in the policy, and so made a part of it

"This qualification, or rather extension of the rule, rests upon the cases of *Routledge* v. *Burrell*, (1 H. B. 254,) and *Worsley* v. *Wood*, (6 T. R. 210.) On referring to these cases, it will be found, that the policies, on their face, contained an express stipulation that the insurers were to be liable, according to the exact terms of their printed proposals. It was necessary, therefore, to resort to those proposals, to ascertain the terms of the contract, and, without such reference, the contract itself would be unintelligible. In such a case, no doubt the proposals, thus referred to, may be considered as incorporated in the policy, and as making part of it.

"But these cases certainly do not establish the rule, that every paper or document referred to in the policy, is to be considered as incorporated in it. When the policy itself contains a full and intelligible description of the subject matter insured, it is not necessary to look out of it, to ascertain the meaning of the contracting parties. The insurers having a description of the property in their possession, are presumed to insert in the policy itself, as much of that description as they deem material, and by omitting any part of it, they show that they are content to take such part as a representation merely, and to look to it only, for the purpose of estimating the risks. (1 Con. Marsh. 451.)

"In reference to the case now before us, it seems to me that we cannot hold the description, as generally referred to in the present policy, to be a warranty, without violating the plain spirit and intent of the contract. The first condition annexed to the policy, provides that applications for insurance on property out of the city of New York, must be in writing, and contain a description of it, and that if any person shall describe the same, otherwise than as it really is, so that it be insured at less than the rate of premium specified in the printed proposals of the company, the insurance shall be void.

"Here is an express declaration of the object and effect of a representation or description of the subject insured. It is to enable the company to judge of the character of the risk, and any mistake or inaccuracy in it, is evidently considered as not affecting the contract, if it be not material. It is clear, that such a representation cannot be converted into a warranty by a mere reference to it, in the body of the policy, without entirely losing sight of the object for which it is required by the company to be made. Every policy contains such a general reference. It is a part of the printed clause of the instrument, and could never have been intended to convert into an express warranty, with all its legal consequences, a document which the company required to be furnished only as a representation.

"As it respects insurances in this city, it is the known practice of the insurance companies, to employ their own surveyors or agents, to examine the situation of the property to be insured, and to make a report of it. That report is always filed, and referred to in general terms in the policy. Where the report or representation is thus the act of the insurers, it would be against all reason and justice to give it the legal effect of a technical warranty.

"It could not be considered even as the representation of the insured, for the insurers act upon their own knowledge of the facts, upon which the risk is to be estimated.

"It appears to me, from these considerations, that it will accord best with the interest of the parties to these fire policies, to consider nothing as a warranty in any sense, unless it is spread in express terms on the face of the instrument. This is a plain and simple rule, and does not conflict with any established principle of law on the subject of insurance. I am of opinion, therefore, that there was no error in the present case, on the part of the Judge, in charging the jury, that the plan or map of the premises insured, referred to in the policy, as a report on file in the office of the Eagle Company, was not a warranty, and that any variation between that plan and the actual situation of the buildings described in it, could not affect the contract of the parties, unless such variance should be deemed material in the estimation of the risk.

"But it is contended by the defendants, that the actual situation of the buildings, at the time of the insurance, was misrepresented by the plaintiff. That they were represented and insured as finished, while the evidence shows that they were unfinished.

"That the buildings insured were represented as finished, I think is very evident. They are stated as "buildings occupied" in a particular manner; a specific estimate of the value of each is made, and there is no where any intimation, that they were otherwise than finished. On looking at the survey of the buildings, as filed in the office of the Eagle Company, (to which the policy refers,) we find nothing to qualify the inference to be drawn from the general terms of the policy. In the survey, the buildings are spoken of as actually in use, and the appropriation of each is specified. The material inquiry then is, were the buildings in question finished on the 9th of January, 1827, the date of the policy?

"The evidence on this point is certainly contradictory and uncertain; yet upon a careful examination of it, I am satisfied that the decided weight of the proof is, that the building insured were substantially finished at the time of the insurance. Cowly, a witness called by the defendants, and Orr, called by the plaintiff, concur in stating that that they were completed at that time, and that all the carpenters' work done to the buildings, afterwards, consisted in hanging some doors, which had been left unhung, at the request of Orr. There was not then, in fact, any misrepresentation as to the state of the buildings, at the time of the insurance.

2. *Concealment of material facts.*

It has been adopted as a rule, that not only a misrepresentation, but even a concealment of circumstances within the knowledge of the insured, or his agents, which are calculated to enable the insurers to form a due estimate of the risk, will vitiate a policy. But the rule is limited to matters which lie within the private knowledge of the insured, for either party may be innocently silent on facts which the other knows or ought to know, and upon which he may exercise his own judgment. Hughes Amer. ed. 265, 266. The rule on this subject is very broad. "Every fact and circumstance which can

possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material." 1 Marsh. 467. He must even give doubtful news concerning the ship, in cases of marine insurance; ib.—and Bronson, J. seems to consider this rule as equally applicable to fire as marine insurance. *N. Y. Bowery Ins. Co.* v. *New York F. Ins. Co.* 17 Wend. 359.

Whether the omission was the result of mistake or design, is not important. The assured acts at his peril in withholding information. ib. In the case cited, it was held, that an insurance company, who effected a re-insurance by another company was not at liberty to withhold information which they had received in regard to the *character* of the original party insured; but if he does withhold the information and such information is material to the risk, it will avoid the policy of re-insurance. ib.

Where the fifth condition attached to the policy contained in the following words: "Notice of *all previous insurances* upon property insured by this company shall be given to them and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect;" and a part of another condition was:—"Also, if there appear any fraud or false swearing, the claimants shall forfeit all by virtue of this policy:" Held, that the condition in regard to *previous insurance* applied only to insurances effected by the insured or his assigns. *Tyler* v. *Ætna F. Ins. Co.*, 12 Wend. 507. The policy effected by a former owner of the property was not upon the *property of the plaintiff that was insured* within the meaning of the clause. ib.

Where a policy contained a condition "that the insured should forfeit all right to recover on it, unless the buildings insured were accurately described, and the trades there carried on specified, that they might be classed at appropriate rates of premium; and secondly, that if any alteration was made in any building insured, or if the risk was increased, it should be notified to the insurers, and allowed by indorsement on the policy." In an action on the policy, it appeared that the subject of insurance was a kiln, which had never been used for any other purpose than drying corn and seed, until after the insurance, and that the loss occurred in consequence of its being lent, without any remuneration to the insured, on one occasion, for drying bark, which was a more hazardous use; it also appeared that a higher premium was exacted by insurers for a bark kiln than for a malt kiln. Held, notwithstanding that the plaintiff was entitled to recover on the policy:—the Court saying, that the condition pointed to the description of the premises given at the time of insuring, and that description being in this instance correct, nothing which occurred afterwards, not even a change of business, could bring the case within that condition, which was fully performed when the risk first attached. And in answer to the objection that there had been a change of business, &c., the Court said, that the condition referred to pointed at an alteration of business, or something permanent and habitual; and that a single act of bark-drying did not amount to a breach of that condition. That no clause in the policy

amounted to an express warranty that nothing but corn should ever be dried in the kiln, and there were no facts or rule of legal construction from which an implied warranty could be raised. *Shaw* v. *Robberds*, N. & P. 279. 1 W. & W. Dav. 94. Held also that the negligence of the insured himself in drying the bark, was no defense; there being no fraud.

It is not solely on the ground of fraud that concealment of material facts avoids the contract; the omission to state material circumstances, though the omission be the result of accident or negligence, will avoid it; a fortiori if any thing be suppressed or misrepresented from *fraud.* Per Ld. Mansfield, in *Carter* v. *Boehm*, 1 Bla. 594; 3 Burr, 1909.

"Insurance is a contract upon speculation, the special facts upon which the risk is to be computed lie commonly in the knowledge of the insured only, the underwriter trusts to his statement, and proceeds upon confidence that he does not keep back any circumstances within his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen by mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement." ib.

The insured has no right by tendering an increase of premium to require the insurer to confirm a contract invalid in itself; for the insurer has in such a case a right to say, that he would not have subscribed the policy upon *any terms* if he had been informed of the circumstances which were withheld from him. His intention being to undertake only for the risks that were communicated to him, if he is deceived, that is sufficient to avoid the contract; nor is the concealment less fatal, though the circumstance concealed turn out to be unfounded in fact, though supposed to exist. Emerig. tom. i. p. 20, 21, 68, 69; *Seaman* v. *Fonnereau*, 2 Str. 1183; *Lynch* v. *Dunston*, 14 East, 494.

In *Bufe* v. *Turner*, 6 Taunt. 338; 2 Marsh. R. 46, the doctrine above stated was recognized. The action of covenant sued against the directors of the Phœnix Fire Office, upon a policy of insurance dated July 25, 1814, effected by the plaintiff on a certain ware-house in Heligoland. The policy referred to a letter of the plaintiff of July 11, 1814, containing the instructions for the insurance and certain conditions for the policy annexed: amongst which was "that if any person should insure his buildings and goods, and should cause the same to be described in the policy otherwise than as they really were, so as the same were charged at a lower premium than was therein proposed, such insurance should be of no force; and that persons should give in a particular description of their losses, signed and verified upon oath; and if there appeared any fraud or false swearing, the claimant should forfeit his claim to restitution or payment." The defendants, amongst several pleas, pleaded, that before and at the time of the writing the plaintiff's letter referred to in the declaration, the ware-house, and the merchandise contained therein, being the premises intended to be insured, were in imminent peril of being con-

sumed by fire, which the plaintiff at the time of writing the letter well knew; that the policy was effected upon the representation contained in the letter, but that the plaintiff fraudulently, and with intent to induce the defendants to effect the policy, concealed from the defendants the fact, that the premises were in such peril; by reason of which concealment the defendants averred that the policy was void. The plaintiff replied, and defendants joined issue on the replication. It appeared at the trial that the plaintiff was possessed of two ware-houses in Heligoland, one of which was separated by only one other building from the workshop of Jasper, a boat-builder, wherein a fire broke out on the 11th of July. That fire, however, was apparently extinguished in half an hour, and four persons were employed by the plaintiff, who was a magistrate there, to watch during the night, lest the fire should again break out. The plaintiff in the same evening wrote the letter referred to in the declaration to his agent in London, requesting him to effect the insurance against fire for three months at £400 upon the plaintiff's ware-house, (therein described,) as also upon the coffee in casks and bags then stored in the same ware-house, value £3,500. The mail for England was to sail that day, and was then closed; but the plaintiff procured the master of a pack-boat to take the letter with him and put it into the post office at Cuxhaven, so that the letter left Heligoland at a late hour on the same night, and it reached England by the same packet on the 24th, and the plaintiff's agent on the following day effected the policy in question. Early in the morning of the 13th, a fire again broke out in the work-shop of Jasper, the boat-builder, and consumed the premises insured. The Jury acquitted the plaintiff of any fraud or dishonest design, the fire being apparently extinguished when he ordered the insurance, but thought that the circumstance of the fire on the 11th ought to have been communicated to the defendants, who without this informatian did not engage on fair grounds with the plaintiff, and for whom, under these circumstances, they gave their verdict. A motion was afterwards made to set aside the verdict and have a new trial, but the Court refused the rule.

Where there is no express provision in the policy against the erection of new buildings, contiguous to those insured, no such prohibition can be implied. By Oakley, J. in *Stebbins* v. *The Globe Ins. Co.*, 2 Hall, 632. And the erection of buildings on vacant ground, by the assured, subsequent to the policy, and contiguous to those insured, is immaterial, unless the insurers can show that they have been injured by such erection. ib.

All questions as to what facts are material, and necessary to be commuuicated to the assurers at the time of the application, is matter for the Jury. *N. Y. F. Ins. Co.* v. *Walden*, 12 J. R. 513; *Tyler* v. *Ætna F. Ins. Co.*, 12 Wend. 507.

CHAPTER VIII.

OF LOSSES.

The loss must be from some peril insured against; and to found a claim under the policy, a loss or damage by fire must occur. Where a policy of insurance was effected "against all the damage which the plaintiffs should suffer by fire in their regular built sugar-house," and the register over the fires of the sugar-house, which was usually shut at night to exclude the air, was continued shut on a morning when the fires were lighted, in consequence of which the sugar was much injured, by the sparks and smoke, this was held not to be a loss within the policy, for the damage was not caused by ignition, the fire having always remained where it ought to have been; the injury was attributable to the mismanagement of the register. *Austin* v. *Drew*, 6 Taunt. 436; 4 Camp. 360 S. C. But where a loss happened in consequence of the improper lighting of a fire, and bringing a quantity of tar into the building for the purpose of tarring it, the loss was held to be within the policy, though the property was insured at the lowest rate of premium. 1 R. & M. 90.

Where a ship was burned by the captain to prevent her from falling into the hands of the enemy, this was held to be a loss within the policy. *Gordon* v. *Rimington*, 1 Camp. 123; 3 B. and Ald. 398; 5 M. and S. 461. Whether the fire is occasioned (as observed by Ld. Ellenborough) by a common accident, or by lightning, or by an act done in duty to the state, cannot be material. Nor can it make any difference whether the ship is thus destroyed by third persons, or by the captain and crew acting with loyalty and good faith. Fire is still the *causa causans*, and is expressly covered by the policy, ib. ibid. 6 Taunt. 436; 2 Marsh. 130. S. C. 4 Camp. 360. S. C. A loss arising from this cause is embraced by the policy, although it is remotely attributable to the neglect of the master and mariners; for although the insured are originally bound to provide a captain and crew of competent skill, they do not undertake for the conduct of the crew in a subsequent period of the voyage. 2 B. & A. 73; 5 ib. 171; and see 4 Taunt. 127, 128; 7 B. & C. 219. It would be otherwise if the subject of insurance at the time of the insurance contained within itself a latent principle of ignition. As if goods are put on board the ship in a damaged state, and are in consequence liable to effervesce, and generate the fire by which they are consumed, the underwriters are liable for the loss of the goods. 3 Campb. 133.

1. *Total Loss.* Whenever a total loss, in the legal contemplation of the phrase, has accrued, an abandonment or offer to abandon by the insured, gives

a vested right to claim for such total loss, and throws the property upon the assurer. Per. Parsons C. J. in *Lee* v. *Boardman*, 3 Mass. 238.

In such case the master or whoever has charge of the property, becomes instantly upon the abandonment the agent of the assurer, and the earningsof the ship belong to him ; and where the cargo is insured, the rise and fall of the market is at his hazard, and to his benefit ; so that upon abandonment seasonably made or offered, the only question would seem to be, whether a right to abandon existed at the time ; and if it did, the relation of the parties to the property is fixed by that act, unless where the assurer does not accept and the assured waives his right. ib.

Goods were insured in several warehouses and one only was destroyed by fire, and it was held, that plaintiff was entitled to a full indemnity. 3 Miller, 366.

In a marine insurance, a damage to the vessel by any peril insured against, so that the repairs will exceed *three fourths* of her actual value before the disaster happened, the owner is entitled to claim as for a total loss. This amounts to an injury exceeding *half the value*, for one third the expense of repairs is deducted. New for old. 3 Wend. 658. But the assured may always recover the actual loss without abandonment. He may repair, and then claim the amount of his actual loss, although the injury is in proportion of three fourths of her value. 2. Pick. 249.

2. *Of Partial losses and Adjustment.*

In a marine policy, it is settled that *partial loss*, and average are understood to mean the same thing ; and *partial loss* includes both general and particular average , and the latter term includes all partial losses except general average. *Wadsworth* v. *Pacific Ins. Co.*, 4 Wend. 33.

Where the policy contained the clause—" insurance to be against stranding or a total loss ;" and the cargo was principally mules, the greater part of which were lost by the perils of the sea, and the remainder injured :—Held, that nothing short of an absolute destruction of the whole property insured, would render the insurers responsible, and if any portion reached the port of destination they were discharged from liability. *Brooks* v. *The Lou. Ins. Co.*, 17 Martin, 530 ; 16 ib 64 S. C. The words total loss in a policy means a physical total loss or destruction of the property ; and where the assurers take no other risk than general average and such total loss as may arise by the absolute destruction of the property, and some of the articles only were lost or stolen ; it was held to be neither a case of general average, nor an absolute destruction of the property, and consequently the insurers were not liable. *Guerlain* v. *The Columbian Ins. Co.*, 7 J. R. 527. Whenever the assured is compelled to pay an increased freight as an unavoidable consequence of the perils of the sea, the underwriters are liable. By Wilde, J. in 17 Mass. 477.

In a marine valued policy, if only a part of the goods are put at risk, the assured can recover, in case of a total loss, only such a proportion of the val

uation, as the goods, which were at risk, bore to the whole subject of insurance. *Wolcott* v. *The Eagle Co.*, 4 Pick. 429.

The same rules apply to a valued and an open policy, in adjusting a general average. By Parker, C. J. 2 Pick. 1.

The expense of enabling a stranded vessel to complete her voyage, is a subject of general average. ib. So expenses incurred in exertions to save the property insured, is a subject of general average, to which both the insurer and insured are liable to contribute in proportion to their risks. Thus, in *Welles* v. *Boston Ias. Co.*, 6 Pick. 182, where the insurance was on the stock in trade of a store keeper; the insured covered the sides of his Store with blankets and thereby saved his stock in trade from being consumed: Held, that the injury to the blankets was a subject of average to be made by a contribution from the buildings and property in the immediate vicinity saved. ib. It appeared, that the insurer consented to the exertions of the insured. But buildings in the neighborhood, upon some of which defendants had insured, were considered too remote to be brought into average, although they might have been exposed if such exertions had not been used. ib.

3. *Notice of loss.*—The clause requiring proof of loss in marine policies, has been construed with considerable liberality. The Court have looked to circumstances; and required no more proof of the party than what appeared to be within his control. In *Lawrence* v. *The Ocean Ins. Co.*, 11 J. R. 260. Thompson, J. in delivering the opinion of the Court, says the clause "requires only reasonable information to be given to the underwriters; so that they can be enabled to form some estimate of their rights and duties, before they are obliged to pay. This clause has always been liberally expounded; and is construed to require only the best evidence of the fact which the party possesses at the time. Such has been the uniform construction put upon it by this court. (2 J. R. 136—8 ib. 317.)" The principle of this decision was recognised in respect to a fire policy in the case of *Norton* v. *The R. & S. Ins. Co.*, 7 Cowen, 465. One condition annexed to the policy in that case was, that "all persons insured, &c. sustaining any loss or damage by fire, are forthwith to give notice to the company, and, as soon after as possible, to deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof of the same by their oath or affirmation, and by their books of account and other vouchers, as shall be reasonably required." Held, that where the papers were consumed with the goods, it was not necessary to go into details in the notice; a statement of the gross amount lost, was sufficient. Ch. J. Savage in delivering the judgment of the court observes:—"The clause itself in the policy before us, expressly contemplates the latitude arising from circumstances. The account of the loss or damage is to be as particular as the nature of the case will admit of; and we think, after the total destruction of those papers which alone could furnish accurate details, the notice of the 2d March was sufficient."

Though the loss is stated in the declaration at $1500, which was the amount insured, and the plaintiff in his affidavit stated the loss at nearly $2500, exclusive of furniture; and the magistrate in the certificate adopted

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the latter sum as the true amount of the loss: Held, that the variance was not material; for the plaintiff did not profess to set out the certificate *in hæc verba*. 16 Wend. 385; 12 ib. 512, S. C.

4. *Losses in open and valued policies.*

The object of a valuation is to prevent any future contest, and the party must be bound by the valuation he has assented to, unless there be fraud. 16 Martin's Lou. R. 661; 3 Cowen, 210.

In a case of a valued policy where the underwriters are not to be liable for a particular average unless it shall amount to five per cent, the per centage is to be reckoned on the valuation after deducting the premium, and where the vessel sustained a damage in a gale, and several months afterwards another damage by running afoul of another vessel, it was held, these two losses could not be joined to make up the five per cent. 7 Pick. 259.

A party insured by one policy for £1700 on the ship S. valued at £3100, and by another for £2000 on the same ship, valued again at £3000, cannot receive more than £3000 on the two policies. *Irving* v. *Richardson*, 1 M. & Rob. 153; 2 B. & Adol. 193.

The policy when made on the assured's own account in a given sum, for a specific voyage, or term of time upon the ship or the goods on board of her, against the perils of the sea, and other enumerated risks, is always understood to be an open policy, and to entitle the insured in case of loss, whether total or partial, to an indemnity to the amount of his actual loss from the perils which the contract professes to protect him. 1 Hall, 41. This principle applies alike to Marine and fire insurances.

Where the policy against loss by fire did not contain the words "valued at;" but it stated the insurer had insured $8500, on one brick house and two wooden ones;—the former at $6500, and the latter at $1800,—adding "and the said company do hereby promise to make good to the insured all such loss and damage not exceeding the sum hereby insured:—Held, that this was not a valued policy; the valuation in the policy being rather the fixing a maximum beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value. *Wallace* v. *Ins. Co.*, 4 Miller's R. 289.

The valuation in the policy is in the nature of liquidated damages; and if the loss is total and the property distinctly valued in the policy, that valuation I apprehend must govern in all cases. By Thompson, J. 5 J. R. 368. See 15 Mass. 343; 16 Mart. 661. The underwriter is liable according to the valuation of freight, although it has been overrated, 15 Mass. 341.

In a valued policy, if but part of the goods be put at risk, the insured can only recover only for the part at hazard. *Wolcott* v. *Eagle Ins. Co.*, 4 Pick. 429.

In the case of a valued policy, if part of the goods be not on board at the time of the loss, the assured cannot recover as for a total loss, *semble*. *Rickman* v. *Carstairs*, 2 Nev. & M. 562.

The rules applicable to Marine Insurance, as far as analogy between the

two cases will hold, ought to govern. Thus, in *Harris* v. *The Eagle Fire Ins. Co.*, 5 J. R. 368, where the insurance was upon merchandise in a tobacco manufactory, and on the back of the policy was a memorandum specifying 380 kegs of tobacco worth $9,600. Held, that this was to be considered a valued policy, and the valuation was in the nature of liquidated damages. Unlesss the valuation is grossly enormous, the valuation is to be taken as the rule of damages. By Putnam, J. 4 Pick. 429; 16 Mart. R. 661; 15 Mass. 341.

There must be a special agreement inserted in the policy to make the contract a valued one, and substitute an agreed for the actual value. By Jones, C. J. 1 Hall, 48. Insurances against loss by fire are usually open policies upon interest, and protect the assured only to the extent of his interest in the property. ib.

The insurer agrees to make good all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property specified during the continuance of the insurance. These stipulations are general, and apply equally to every species of loss or damage, total as well as partial, and they exclude all pretension to the claim of the sum mentioned in the policy in any case as a valuation of the subject of the insurance, or as liquidated damages recoverable by the insured. The printed conditions also annexed to the policy, requiring a particular account of the loss or damage under oath, and supported, if required, by the books or proper vouchers of the persons sustaining loss or damage by fire, conclusively show the contract to be understood by the parties as an open policy, and conclude the assured from claiming satisfaction beyond the actual value of the property he looses by the fire at the time of the loss. ib.

The intrinsic value of the property at the time is the true measure of the damages within the meaning of the contract of indemnity. The local advantages or disadvantages of the property, and the uses to which it can be applied are not to vary it. Thus, where the building stood upon a lot of ground in the city of New York, which belonged to J. R. Livingston, who had leased the same to the plaintiff for a term, which expired a few days subsequent to the fire, and the lease contained a clause, entitling the lessee to a renewal upon the terms therein expressed:—Held, that the assured was entitled to recover the whole amount of the sum insured, the same falling short of the intrinsic value of the tenement, although it appeared, that the lease had not been renewed, and that the plaintiff had not given any notice of his desire to renew the same; and the value of it as it stood, was about $1000, but if it had been necessary to remove it from the lot, the value was but about $200. *Laurent* v. *The Chatham F. Ins. Co.*, 1 Hall, 41.

We have seen that factors or commission merchants who hold goods on commission, are entitled to recover to the full extent of their value, the amount payable for the loss, on an averment of interest on themselves. *De Forest* v. *The Fulton Ins. Co.*, 1 Hall, 84, 116.

In an *open policy* there seems to be a difference of opinion, whether the contract contemplates the *market price* of the property at the time and place

of exportation as decided by Judge Washington in 2 Wash. C. C. R. 468 ; or the *invoice price*, 1 J. C. 120, or *prime cost* with the usual charges, 7 J. R. 355.

Goods. The value of the goods is to be estimated according to the invoice price ; an insurer is not liable for the rise or fall of the market, or for a loss that may arise from the difference of exchange. Insuarance is a contract of indemnity against the perils of the voyage ; the insurer engages, so far as the amount of the prime cost, or value in the policy, "that the thing shall come safe," he has nothing to do with the market ; he has no concern in any profit or loss which may arise to the merchant from the goods ; if they be totally lost, he must pay the prime cost, that is, the value of the thing insured at the outset : he has no concern in any subsequent value. So likewise, if part of the cargo, capable of a several and distinct valuation at the outset be totally lost ; as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the price of those ten hogsheads, without any regard to the price for which the other ninety may be sold. But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage ; but if you can fix whether it be a third, fourth, fifth worse, the damage is fixed to a mathematical certainty. How, then, is this to be found out ? Not by any price at the outset port, but by that at the port of delivery, where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it equally shews whether the damaged goods are a third, fourth, or a fifth worse than if they had come sound ; consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing, and as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged." (2 Burr, 1170 ; Hughes Ins., 370.) It was held in case of a partial loss on tobacco that though the sale of both the sound and damaged hogsheads might be the most certain means of ascertaining the difference and calculating the amount of the loss ; yet the valuing of the sound hogsheads by a regular broker, the parties acting bona fide, was sufficient. 2 Dow, 545. Appeal from Scotland. And the rule for calculating a partial loss on goods by sea damage, is to estimate the difference between the respective gross proceeds of the same goods when sound, and when damaged, and not the net proceeds ; this rule being adopted chiefly to prevent the underwriter's liability from being affected by the fluctuation of the market, or by the port duties, or charges after the arrival of the goods at their port of destination. 2 East, 581 3 ; B. & P. 308. Nor is there any difference with regard to the mode of estimating the loss between a valued and an open policy ; for the effect of valuation is to fix by agreement the amount of the prime cost. 2 Burr, 1170. The rule for estimating the loss in the case of an open policy, is to take the invoice price at the loading port, together with the premium of insurance, (4 Taunt. 5, 11.) and commission, as the basis of calculation ; and when a partial loss occurs, the amount is ascertained by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods, at the port of delivery, and applying that propor-

11 Pet 195. Story J.

tion, (be it a half, a quarter, an eighth, &c.) with reference to such estimated value at the loading port, to the damaged portion of the goods. 2 East, 639. In the case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market price at the port of delivery cannot be alone the standard, as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an owner of goods, who has increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, i. e. it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be compensated. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, i. e. to the invoice price, being itself calculated as before stated; and we then obtain the one-half, the one-fourth, or one-eighth of the loss to be made good in sums of money. This rule of calculation is generally favorable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one; or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. ib. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defects of stipulation, and adopts the invoice value, with the additions I have mentioned, as the standard of value for this purpose. 12 East, 647. The nature of the contract, as observed by Lord Mansfield is, that the goods shall come safe to the port of delivery, or if they do not, to indemnify the insured to the amount of the prime cost, or value in the policy. If they arrive, but lessened in value, through damage received at sea, the nature of an indemnity speaks demonstrably that the merchant must be put into the same condition (relation being had to the prime cost or value in the policy,) which he would have been in if the goods had arrived free from damage; that is, by paying such proportion or aliquot part of the prime cost or value in the policy, as corresponds with the proportion, or aliquot part of the diminution in value occasioned by the damage. No private scheme or project in trade of the insured can effect the insurer. If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce great injustice and inconvenience. The underwriter knows nothing of them. The underwriter is not affected by the price; and the right of the insured to a satisfaction where goods are damaged arises immediately upon their being landed at the port of delivery. Hughes Ins., 373.

The term, partial loss, is in mercantile practice, adapted to what is called a

total loss of a part; as for instance, in an insurance of twenty hogsheads of sugar, if one hogshead be washed out, the amount lost is to be paid for at the prime cost, or at the value in the policy, if it be fixed. Stev. 135. *Le Cras* v. *Hughes*, Park, 174. There is a material distinction between a deterioration in value of the thing insured, or particular average in a stricter sense, and expenses incurred for the preservation of the same thing; for such expense: may be claimed, although there be no claim for particular average, either because the policy was warranted free from particular average, or because the per centage was short of that for which the underwriter becomes liable. Benecke, 424; 4 Taunt. 367.

5. *Payment of loss.* The insurance companies in general, reserve to themselves an option of reinstating the premises, or paying the amount of the insurance money. And the building act, (stat. 14, Geo. 3, c. 76. s. 83.) empowers the governors or directors of the several insurance offices, upon the request of any persons interested in or entitled to any houses or buildings which may be burned down, demolished, or damaged by fire,—or upon any grounds of suspicion that the owner or occupier, or other person, who has insured, has been guilty of fraud, or of wilfully setting houses or buildings on fire, to cause the insurance money to be laid out and expended as far as the same will go towards rebuilding, reinstating, or repairing the property burned or damaged, unless the parties claiming the insurance money, do within sixty days after the claim is adjusted, give sufficient security to the governors or directors of the office, that the insurance shall be laid out and expended, or unless the insurance money be within that time settled, and disposed of amongst the contending parties, to the satisfaction and approbation of the governors and directors. Although, therefore, a policy, as a personal contract, does not pass with the property insured, yet a covenant to insure to a certain amount entered into by a lessee or other person having an estate in land is so far beneficial to the property, that in cases to which this statute applies, it will run with the land. and an assignee entitled to the benefit of covenants real may obtain an action on the covenant to insure if be not observed. So insurance money received by a tenant for life in respect of a house burned down, and kept distinct by him as such, was held in a court of equity to be applicable to the uses of a settlement of real property, and not to pass with a be quest of the personalty.

CHAPTER IX.

OF THE PROCEEDINGS ON POLICIES.

1. *Of Preliminary Proof.*
2. *Of the Jurisdiction of the Courts of Common Law.*
3. *Of Arbitration.*
4. *Of the Declaration.*
5. *Of Pleas to a Declaration under seal.*
6. *Pleas to a Declaration not under seal.*
7. *Of the Evidence upon the trial.*

1. *Of Preliminary Proof.*

Most offices have a condition endorsed on their policies to the following effect:

IX. All persons insured by this Company, and sustaining loss or damage by fire are forthwith to give notice thereof to the Company; and as soon after as possible to deliver in a particular account of such loss or damage, signed by their own hands, and verified by their oath or affirmation, and also if required, by their books of account and other proper vouchers; they shall also declare on oath whether any and what other insurance has been made on the same property, and procure a certificate under the hand of a magistrate, notary public, or clergyman, (most contiguous to the place of the fire, and not concerned in the loss,) that they are acquainted with the character and circumstances of the person or persons insured, and that having investigated the circumstances in relation to such loss, do know or verily believe thta he, she or they, really and by misfortune, and without fraud or evil practice, hath or have sustained, by such fire, loss or damage to the amount therein mentioned; and until such proofs, declarations, and certificates are produced, the loss shall not be payable. Also, if there appear any fraud, or false swearing, the claimant shall forfeit all claims by virtue of this policy.

The offices usually undertake to pay the loss "in sixty days after the loss shall have been ascertained and proved, without any deduction whatever; and in case differences shall arise, touching any loss or damage, it may be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing shall be binding on the parties."

The clause in the policy, that the loss is to be paid, thirty days after proof thereof, gave rise to what is termed, in our books, *preliminary proofs*, and as

its object was to furnish reasonable information to the insurer, so that he might be able to form some estimate of his rights and duties, before he was obliged to pay, it has always been liberally expounded, and is construed to require only the best evidence of the fact that the party possesses at the time. Per Kent, C. J. in *Barker* v. *Phœnix Ins. Co.*, 8 John. R. 307; *Talcot* v. *Mar. Ins. Co.*, 2 J. R. 130; *Haff* v. *Same*, 4 J. R. 132. The *sufficiency* of it, is always a question of law, to be determined by the judge at the trial; and no evidence can be there received to alter the character or effect of the proofs exhibited to the defendants. Per Oakley, J. in *Rankin* v. *The American Ins. Co. of N. Y.* 1 Hall, 619. In this case the judge was called upon to hear evidence of a usage controlling the construction of the policy, so as to render necessary the production of a particular document as a part of the preliminary proofs; this was held to be clearly inadmissible. ib.

"Persons sustaining loss or damage by fire, shall forthwith give notice thereof, &c. and as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, &c.; and they shall accompany the same with their oath," &c. Held, that the contract in respect to *notice, oath* and *certificate of magistrate* only required the party originally insured to give notice, &c. to his immediate insurers, who are only bound to transmit the same to the re-insurers, 17 Wend. 359.

In *Catlin* v. *The Springfield Fire Ins. Co.*, 1 Sumner's R. 434, the policy was against fire; and contained the condition that "all persons insured, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and as soon after as possible to deliver in a *particular account of such loss or damage*, signed with their own hands, and verified with their oath or affirmation, and also, if required, by their books of account and other proper vouchers:"—And to "procure a certificate under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of fire, and not concerned in the loss, nor related to the insured or sufferers, that they are acquainted with the character and circumstances of the person or persons insured; and do know and verily believe he, she, or they, really and by misfortune, *and without fraud or evil practice*, hath or have sustained by such fire, loss and damage to the amount therein mentioned. And until such proofs, declarations and certificates are produced, the loss shall not be deemed payable; also, if there be *any fraud* or false swearing, the claimant shall forfeit all claim by virtue of this policy:"—*Held*, that the *particular account* required, meant only 'an account of the loss, that is, of the thing or value lost; or of the damage, that is, of the amount of the injury sustained. But the insured was not required to state how the loss happened, or the cause or occasion of it.

Good faith and the true spirit and intention of the contract requires the insured to disclose, at least, all the documentary evidence in his possession touching the nature and extent of the loss. 4 J. R. 132.

The statement presented by the assured as to his loss will not preclude him from recovering what is actually due, where it appears that he was under a mistake as to the extent of his legal rights. 14 Wend. 399.

If the underwriter when applied to for payment of a loss, replies that he

will not settle the claim in any way, he will be considered as waiving the preliminary proof of interest on the part of the assured. *Francis* v. *The Ocean Ins. Co.*, 6 Cowen, 404; 2 Wend. 64; 9 J. R. 192. And there seems no difference in this respect between marine and fire insurance. 7 Cowen, 462. But the president of a corporation is not clothed with that power; it must be done either by the board of directors, or a committee appointed to adjust the claim.

The acts required by these proposals to be done by the assured are conditions precedent, without the performance of which he cannot require payment of the loss. *Wood* v. *Worsley*, 6 T. R. 710; *Inman* v. *Western Fire Ins. Co.*, 12 Wend. 452. Therefore, in an action on a fire policy, where the condition annexed to the policy, required the *assured forthwith to give notice* of the loss to the insurer, it was held necessary to aver that *notice was forthwith given. Inman* v. *Western Ins. Co.*, *supra.* There must be no unnecessary delay; due diligence should be used under the circumstances of the case. *Cornell* v. *Le Roy*, 9 Wend. 165. But a notice given 38 days after the fire was held to be neither a literal nor a substantial compliance with the condition. ib. Preliminary proofs were delivered forthwith after the fire, and delivered to the insurer *at his request*, without taking copies; and subsequently he refused to give copies. Held, that new papers might be made, although *four months* had elapsed after the fire. ib. The preliminary proceedings may be conducted in the name of an assignee when the assignment was made with the consent of the insurer. ib.

It appeared in evidence, that the President and one of the directors of the company went to the fire, for the purpose of examining into the matter, Held, that this was notice, substantial notice upon which they acted. *Roumage* v. *The Mech. Fire Ins. Co.*, 1 Green's R. 110. If the knowledge be fully communicated, courts are not very particular as to the form in which it is done.

Conditions are to be construed strictly against those, for whose benefit they are reserved, when they impose burdens on other parties. By Story, J., 1 Sumn. R. 440.

Production of the Certificate of Minister &c. In *Wood et al.* v. *Worsly*, 6 T. R. 710, *in error*, the proposals attached to the policy upon which that action was brought, required, among other things, that the assured should give notice of the loss forthwith, and as soon as possible deliver in an account, &c. and should procure a certificate under the hands of the minister, church-wardens and some respectable householders of the parish, not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he, by misfortune and without fraud or evil practice, had sustained by such fire the loss or damage therein mentioned. The declaration averred that the plaintiffs gave notice of the loss on the day of the fire, and also delivered a particular account of the same; and that on the same day they procured and delivered to the company a certificate under the hands of four respectable householders of the parish, to the effect required in the printed proposals; and that they applied to the minister and church wardens of the parish to sign such certificate, but that they,

without any reasonable or probable cause, wrongfully and unjustly refused, and have ever since refused to sign it. It was the unanimous opinion of the court of king's bench, that this averment was not sufficient to enable the plaintiffs to recover; that the certificate of the minister and church wardens, by the contract between the parties, was made a condition precedent to the payment; and that it was not in the power of the plaintiffs to vary the contract by substituting a certificate made by other persons. It was admitted by the counsel for the plaintiffs (the defendants in error) that if the procuring of the certificate was a strict condition precedent, no action could accrue until they had procured it. But it was strongly contended that it was not so to be considered; that the procuring of the certificate was not a fact on which the plaintiffs title was grounded, but was mere evidence of that title; that here the title was made out without it. It was urged that it was apparent from the whole instrument that it was the intention of the parties that the assured should recover, provided they had been guilty of no frand; that here the loss was settled by the verdict, and all fraud negatived. It was admitted that the assured were bound to comply with the prescribed regulations and conditions as far as such compliance depended upon themselves; that here they had done every thing that was in their power to comply with them; they had given notice and delivered in an account of the loss, and procured a certificate from four reputable freeholders, and had called upon the minister and church wardens for their signatures, which they had without any reasonable cause refusd; that the plaintiffs ought not to be prejudiced by such improper refusal—an act over which they had no control. But it was answered by Lord Kenyon, that it was clear in his judgment, from the printed proposals, that the certificate there prescribed should precede payment by the insurance office; that it was therefore a condition precedent; and that where it is imposed, as a condition precedent, that any thing shall be done, not impossible in itself, no matter how improbable or difficult it may be, it must be done, or the right which was to attach on its being performed did not vest; and he put the case of a condition, that A. shall enfeoff B., and A. do all in his power to perform the conditions, and B. will not receive livery of seizin; yet, he remarked that it had not been doubted, from the time of Lord Coke, that the right which was to depend on the performance of that act did not accrue. He also adverted to the imputed harshness and severity of this doctrine, and remarked that these companies were subject to great frauds and impositions; and that it was but an act of common prudence, to take all possible care to protect themselves from imposition; and that, to require a certificate from the minister and church-wardens, men of character and respectability, as might be presumed, that they believed the loss had been fairly sustained, was not unreasonable; but whether it was or was not, they had a right to make it a condition of the contract, and to refuse to insure upon any other terms; that it was the misfortune of the plaintiffs if the individuals named would not certify; but that it gave, neither to them nor the court, a right to alter the contract. Ashurst, J. also held the certificate to be a condition precedent, without which the plaintiff could not recover. He also expressed the opinion that there was

nothing unreasonable in requiring it; that when the temptation to commit fraud was so great, it was an act of prudence in them to require a certificate from the minister and church-wardens, persons who, from their situation in life, were not likely to assist in such fraud. Grose and Lawrence, Js. were equally clear and decided in their opinions. The latter remarked, that it appeared to him that a fire without fraud (under the contract of the parties) was not enough to give the assured a right of action; but it must be a fire accompanied with the notice, affidavit and certificate specified in the proposals; that the certificate produced was not even a substantial performance of the condition, admitting that would have been sufficient; that it was the substitution of one certificate for another; that it may be difficult to determine who shall be called reputable or substantial persons; and, in order to avoid that difficulty, the insurance company insist upon a certificate from persons holding public situations in the parish; that in his opinion there was nothing unreasonable in this; that it was a duty which the officers owed to the public as well as themselves, to take every precaution to guard against fraud; and unless some such check as this were interposed, they would be holding out a premium to wicked men to set fire to their own houses. He was clear that it was a condition precedent, and admitting the refusal of the minister and church-wardens to be improper and unreasonable, he said the cases were uniform to show that if a person undertakes for the act of a stranger, that act must be done.

In *Oldman* v. *Bewicke* and others, 2 H. Black. 577 note, the declaration instead of averring the delivery of the certificate signed by the minister and church-wardens, alleged by way of excuse, that the minister, at the time of and long before the loss, resided at a distance from and out of the parish, and was wholly unacquainted with the character and circumstances of the assured, and wholly unable to make such certificate as was required by the policy; but the assured did procure and deliver to the defendant a certificate, under the hands of A., B., and C., respectable inhabitants of said parish. The defendant pleaded that the premises were wilfully set on fire by the assured, and that he had no interest in them at the time of their destruction; upon which plea the plaintiff took issue, and both the issues were found in his favor by the jury. But the judgment was arrested, for the defect of the declaration, in not averring delivery of the certificate of the minister. It was held to be a case of a defective title, and not of a title defectively set forth, and therefore not waived by the plea, or cured by the verdict. All the judges who heard the cause, Lord Loughborough, and Gould and Nares, justices, held it to be a clear case of a condition precedent, in which an averment of performance was indispensable; that an excuse for performance was inadmissible.

In *Routledge* v. *Burrell*, 1 H. Bl. 254, the plaintiff averred that he applied to the minister and church-wardens, and to many respectable inhabitants, to procure the certificate required by the proposals, and that he was entitled to such certificate; but that the defendant, by false insinuations, induced the minister to refuse to sign it. The defendant in his plea to the first count, denied that he had induced or prevailed upon the minister to refuse the certifi-

cate. To the second count he pleaded generally, that the assured had not procured or delivered the certificate, &c.; to which the plaintiff demurred. The court held the case too clear to admit of doubt, and gave judgment for the defendant.

It seems, then, from an examination of the preceding cases, to be settled, that the acts required to be performed by the proposals annexed to the policy are conditions precedent, without the performance of which the plaintiff cannot recover his loss; that performance must therefore be averred in the declaration, or it will be held bad upon demurrer, or judgment will be arrested after verdict; that no excuse can be received in lieu of performance, and that it will not avail the plaintiff, although he show that he has done every thing in his power to comply with the condition, but has been prevented by the unreasonable or wrongful act of a third person; and that it is of no importance whether the risk of the defendant is, or is not increased by the omission.

The ninth condition, annexed to the policy on which the action is founded, provides that all persons sustaining loss or damage by fire shall forthwith give notice thereof to the company, and as soon thereafter as possible deliver in a particular account of such loss. The declaration alleges the buildings to have been consumed on the 23d of February, 1827, and that the plaintiff gave notice thereof to the defendants on the 2d of April ensuing. Does this satisfy the condition which requires notice, to be forthwith given? Forthwith means immediately, without delay, directly. In giving a construction to terms of this description, some regard must undoubtedly be had to the nature of the act or thing to be performed, and the circumstances of the case. Where the thing required to be done is complicated, composed of a variety of parts, incapable in the nature of things, of being instantly accomplished by a single act or volition, the parties will be understood, when they use language of this prompt and imperative character, as intending merely that there shall be no unnecssary delay in the performance. It may perhaps be conceded that it never imposes upon the party any thing more than what is called due diligence, under all the circumstances of the case. 9 Wend. 165.

The certificate of a magistrate or sworn notary, required by the condition, was held indispensable preliminary proof. *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25. There must be a literal compliance with the conditions *Dawes* v. *The North River Ins. Co.*, 7 Cowen 462: And if a plaintiff at the trial fails to exhibit the preliminary proof, in respect to a condition made a part of the policy, he cannot recover, such a condition is precedent to his right to recover. *Leadbetter* v. *Ins. Co.*, 13 Maine, R. 265.

Where the nearest Officer was a clergyman, and he gave a certificate complying with the condition in the policy, except as to the amount of the property, of which he had no knowledge, Held, that the company were entitled to it—the court saying, under the circumstances, to require this wothless certificate, was excessively strict. 1 Green's R. 10.

It is sufficient, if the certificate of loss be in substance according to the terms of the policy. *Ætna F. Ins. Co.* v. *Tyler*, 16 Wend. 385; 12 ib. 512 S.

C. The rule is not so strict as to require that the certificate should be in the very words mentioned in the policy, provided it be so drawn as to mean the same thing. By Chancellor, in 16 Wend. 385. The condition in the policy required the certificate of the magistrate to state that he was acquainted with the circumstances and character of the assured; and the magistrate stated that having enquired respecting the circumstances of the loss he believed the assured had sustained loss to the amount certified: Held, that this was sufficient. ib.

The clause in marine policies, requiring preliminary proof of interest and loss, is construed to require only the best evidence of the facts possessed by the party at the time. *Barker* v. *Phœnix Ins. Co.*, 8 J. R. 327; *Lawrence* v. *Ocean Ins. Co.*, 11 ib. 260; and by Oakley, J. 1 Hall, 631. Evidence of usage controlling the construction of the policy, so as to render necessary the production of a particular document as part of the preliminary proofs is not admissible. 2 Hall, 619. In that case, the plaintiff sustained damage by the perils of the sea, and the goods were landed at New York without any survey by the wardens of the port. The defendants objected, that by the usage of trade in that port, an actual survey was essential and must be produced as preliminary to charge the insurers: Held, that the evidence was clearly inadmissible. Oakley, J. observes:—"The usage in question, if it could avail the defendant at all, would be a bar to the plaintiff's right of action; and in this view, it was also offered to be proved at the trial. The Judge again properly rejected it." —"It would be creating a condition precedent to the plaintiffs right of recovery, where the contract itself expresses none."

If there is a formal defect in the preliminary proofs, required by the policy or the custom of the place, and which could probably have been supplied, had any objection been made by the underwriters to the payment of the loss on that ground, if the insurers do not call for the document, or make an objection on account of its absence or imperfection, but put their refusal to pay distinctly on some other ground, the production of such preliminary proof will be considered as waived. 9 J. R. 192; 1 Wend. 64; 10 Pick. 536; 16 Wend. 385. See 10 Pet. 507. The underwriters should apprise the insured that the proofs are defective, so as to give him an opportunity to supply the defect, before it is too late; if they neglect to do so, their silence shall be considered a wavier of the defect in the proofs. 16 Wend. 385.

2. *Of the Jurisdiction of Courts of Common Law.*

The ordinary remedy under a policy is in a court of law. The jurisdiction of the courts of common law is exclusive; Courts of Equity, indeed, sometimes in cases of insurance, as in all others, interpose their authority for the purpose of advancing justice, as will be seen in a subsequent chapter.

A court of Equity will not entertain a suit for recovery of satisfaction under a policy, effected in the name of a trustee, unless the trustee has refused to allow his name to be used at law, when that court will compel him to allow it to be used. 4 Bro. P. Cas. 436.

A bill of interpleader has been held to lie in favor of an insurance company against the landlord of the premises which have been burnt down after having been insured by him, (and who brought an action against the office upon the policy,) and against the tenant, who filed a bill against the landlord and the office for specific performance of an agreement for a lease, and claiming a right to have the money laid out in rebuilding the premises. Per Lord Hardwicke, *Motteux* v. *London Assu. Co.*, 1 Atk. 547.

3. *Arbitration.*—The deeds of settlement of most of the companies in England contain a clause enabling the parties to refer matters in dispute to arbitration. This clause is, however, unnecessary, as without it the parties may, if they agree to do so, refer to arbitration; but if they do not agree, the authority of the supreme courts at Westminster is so transcendant that nothing but the express words of an act of Parliament can take away or abridge their jurisdiction in any case; (2 Haw. P. C. 286; 2 Marsh. on Ins. 684; 1 Wils. 129.) such a clause, therefore, will not *compel* a party not agreeing to a reference to have recourse to one; even a covenant between the parties to refer matters in dispute will not oust the courts of their jurisdiction and cannot be pleaded in bar to an action. *Thompson* v. *Charnock*, 8 T. R. 139. It may indeed, in itself, afford a ground of action against either of the parties who may violate the agreement; and if an award be made, or even perhaps if the reference be still depending, that may be pleaded in bar. In 2 C. & P. 550, ruled by Best, C. J., that in a policy against loss by fire, though there was a clause that the demand should not be paid till the amount was settled by arbitration, this did not apply to a case where the insurer denies his general right to recover. See Hughes on Ins., 461.

The remedy for recovering satisfaction on a policy, is by action of *assumpsit*, when the policy is not under seal; or *covenant*, when it is under seal. The action at law upon a policy of insurance may be brought either by the person in whose name it was made, or by the parties beneficially interested, and on whose account the policy was effected. When the policy is effected in the name of a broker or agent, the action may be brought in his name; (2 M. & S. 426; ib. 485; 2 B. & Ald. 314; 16 East 141; 13 ib. 341; 2 B. & P. 155. Note.) And though the person whose name is used in the policy, is interested in the property insured jointly with another, the action may be brought in his separate name, the joint interest being stated in the declaration. Hughes Ins. 463. If the policy should be effected in the name of two persons, when only one of them is interested, the action may be brought in the name of that one. *Marsh* v. *Robinson*, 4 Esp. 98. When several persons are interested, the action must either be brought in the names of all of them, or in the name in which the policy is effected. In selecting the party *against* whom the action should be brought in the case of a double insurance, the insured will be guided by his views of their responsibility, and the circumstances of the particular case. When the subscription is affixed by an agent, the action should be brought against the principal, not against the agent.

Some of the companies in England issue their policies *under seal*, others *not under seal*. Where a company consists of numerous proprietors it has

been thought more advisable, as a further security to the insured, to issue policies under seal, thereby putting it out of the power of the insurers (parties to the deed) for pleading in abatement for want of parties, for otherwise, in strictness, every proprietor ought to be a party. The policy under seal, however, is attended with the inconvenience, as against the company, as it is not competent for them to plead the general issue, and give the special matter of their defense in evidence, but must resort to plead specially the several matters of their defense.

The form of action in cases of policies under seal is in general *covenant.* A general form of declaration *in debt* is given against the two public incorporated companies, (the Royal Exchange and the London Assurance,) by st. 6 Geo. 1 C. 18 S. 4, 11 Geo. 1 C. 30, but it is not usually adopted in practice. 3 Ch. on Pl. 325.

3. *Declaration.*—In a declaration upon a policy under seal, the policy should be recited verbatim, together with all the proposals and conditions to which it refers, constituting a condition precedent, (see Ch. on Pl. 326.) and any material variance or omission will be fatal. (2 Marsh. 686; 3 ch. on Pl. 99.) The declaration should also state that the plaintiff *at the time of making the policy,* and from thence *until the loss and damage,* was interested; for the st. 14 Geo. 3, C. 48, S. 3, provides that the insured shall only recover the amount or value of the *interest* of the insured.

An averment of interest is a material allegation, which requires to be proved in substance as stated. The declaration ought to apprize the insurers of the real contracting parties. And, therefore, when two persons are jointly interested, a declaration, stating in one count that one of the parties was interested, and in another, that the other was interested, is bad, on the ground of variance, and the plaintiff cannot recover on either count. *Cohen* v. *Hannam,* 5 Taunt. 101; *Bell* v. *Ansley,* 16 East, 141. But it seems sufficient at the trial to prove that there is such a firm as E. & Co., without proving the names of the persons who compose the firm, where it is averred in the declaration that A. B., C. D., and certain persons trading under the firm of E. & Co., were interested in the policy. 1 Chitty's R. 49; 15 East, 4. A plaintiff may prove a sole interest in himself, although the policy was effected in the name of two persons, 4 Esp. 98. It does not seem to be necessary to state in what proportions several persons were interested. 6 Taunt. 14. Nor to show in what mode the interest was created, or to state specially the circumstances of the title. 5 B. & P. 309.

The declaration should also state the loss by fire, and that the fire did not happen by any invasion, &c. (or by any of the excepted cases,) and that the plaintiff thereby sustained a loss and damage to the amount of the sum claimed. It should also state his compliance with the conditions previously recited, and his payment, and the acceptance by the defendants of the premium, and that the stock and funds of the company are sufficient to pay to the plaintiff the amount of the damages sustained by him. He should then aver the *breach,* that he hath not in any manner been paid or made good his damage, but that the same is unpaid; that the defendants have *broken the covenant* made

with the plaintiff, and the damages are generally laid at a sum somewhat larger than the sum insured for.

The cause of loss must be correctly stated ; for the intent of the declaration is to apprise the underwriters of the nature of the claim, and to enable them to prepare their defense. Therefore, if a loss be alleged by the perils of the sea, and it appears to have happened from barratry, the variance is fatal. So if the vessel insured be fired upon at sea by a British Ship of war, which mistook her for an enemy, this would be improperly described as a loss by the perils of the sea ; 5 M. & S. 461 ; but if stated in the declaration according to the fact, is one of those perils, losses, and misfortunes for which the underwriters are liable under the general words of the policy. Hughes Ins. 469, 470. A statement of the particular facts which occasioned a loss may therefore be preferable, in some cases, to ascribing it to one of the perils specified in the policy ; in other cases, where the law is doubtful, such a statement may be advisable, because the question of law is raised on the record, and the opinion of a higher court may be obtained if it be desired. A minute statement may also be advisable, because the facts will be admitted, in case of payment of money into court. But when the facts are stated specially and at length in one count, an additional count, if named with less particularity, may properly be introduced, to obviate the damage which might otherwise arise in point of evidence. And the proximate cause of the loss, not the remote cause, is to be principally regarded. ib. A loss stated to have happened by capture, is not sustained, in the case of a policy without interest, if the ship, after being captured and restored on appeal, proceeded on another voyage, and was afterwards lost. ib. So an averment of loss by a seizure by an armed body of rioters, is not equivalent to an averment of a loss by seizure by people to the insured unknown: for the word people in the policy means the governing power of the country. ib. It is a sufficient allegation of barratry that the goods were lost by the fraud and negligence of the master and mariners. ib. But the term barratry being a well known word of art, appears to be a more correct description, when barratry is the known cause of loss. A count on a policy stating a loss by the perils of the sea appears to be sustainable upon proof that the ship was wrecked, although this was occasioned by the barratry of the master and mariners. ib. So, a count stating a loss by capture is sustainable on proof that the ship was captured by a privateer, although this happened from a collusion between the master of the ship and the commander of the privateer, and the plaintiff might have recovered on a count stating a loss by the barratry of the master. ib.

The averment of the *amount* of loss is not material, provided it is framed in terms sufficiently comprehensive. For a total loss may be given in evidence under an allegation of a partial loss.

When the policy is *not under seal, assumpsit* is the proper form of action to be brought upon it against the insurers ; and as the action in such case is founded on a particular and express undertaking made upon a consideration, upon which the law would not, by necessary implication, raise the promise

specified in the policy, the plaintiff must declare specially upon it. (2 Marsh. 687.) The contents of the declaration upon such a policy are much the same, except in matters of form, as before stated to be essential to the declaration upon a policy under seal, and, as in the latter kind of policy, the contract must be set forth with precision, and any material variance or omission will be equally fatal, (2 Marsh, 686.) it is usual to add a count for money had and received, and an account stated, to enable the plaintiff to avail himself of any balance which the defendants may have admitted to be due. (3 Ch. on Pl. 99.) And when several counts are inserted in the declaration, the second and subsequent counts may refer to the first, describing the policy as of the same tenor and effect, &c., as that in the first count mentioned.

4. *Pleas* to a declaration upon a policy *under seal* necessarily vary according to circumstances. The most usual, however, are an absolute denial that the articles mentioned in the declaration were burnt or consumed, and this plea puts the plaintiff upon proof of the quantity, quality, amount and value of his loss. Where buildings, risks, or the like, exposed to public view, are burnt, it is not usual to include them in such a plea: as the declaration usually states that the plaintiff delivered in as particular an account of the loss and damage as the nature of the case admitted of (according to one of the conditions common to most policies); the defendants also, by another plea, usually deny this fact, and this also puts in issue the quantity, quality, amount and value of the articles alleged to be consumed. It is usual also, in another plea, to allege *fraud* in the claim made, where the case warrants it, which it commonly does whenever the offices are driven to resist an action, and they then refer to the condition with reference to *fraud* and *false* swearing, common to all fire policies, and recited in the declaration, whereby the plaintiff forfeits all benefit under his policy, except such as the company may think fit to allow. As the conditions of most offices require the account of the loss and damage sent in to the office to be verified by affidavit, it is very usual, by another plea, to allege *false swearing*, in the claim made; such a plea contains the language of the affidavit, alleges that in such affidavit there is false swearing, refers to the before-mentioned condition, and states in general terms the points on which it is false. (Ellis, p. 91, 92.) See 2 Hall. 490.

Upon the subject of *bringing* money into Court, the reader is referred to the books of practice.

In actions of assumpsit, the general issue is the only plea usually necessary, and commonly embraces all the matters of defense which the insurers may desire to bring forward. But the same rule does not hold when the policy is by deed under seal, and the action is consequently in debt or covenant. For in an action of debt or covenant on a deed, there is, strictly speaking, no general issue, (1 Stark. R. 311,) and the plea of non est factum, though it puts in issue the validity of the deed, as such, does not, in general, enable the party sued to avail himself of the non-performance of a warranty or condition precedent, or of a matter in discharge or excuse of performance. This difficulty was likely to press with considerable weight upon the Royal Exchange, and London Insurance Companies, who being corporate bodies effected their policies under

seal. It was therefore enacted by the stat. 11 Geo. 1. c. 30. s. 43., that "in all actions of debt to be sued or commenced against either of said corporations upon any policies of insurance for the assuring of ships or goods, it should be lawful to and for the said corporations in such action or suit, to plead generally that they owed nothing to the plaintiff or plaintiffs in such suit or action; and that in all actions of covenant which should be sued, it should and might be lawful for the said respective corporations, in such action or suit, to plead generally that they had not broke the covenants in such policy,contained, or any of them, and if thereupon issue should be joined, it should and might be lawful for the jury, if they should see cause upon the trial of such issue, to find a verdict for the plaintiff or plaintiffs in such action or suit, and to give so much, or such part only of the sum demanded, if it be an action of debt or so much in damages, if it be an action of covenant, as it should appear to them, upon the evidence given upon such trial, such plaintiff or plaintiffs ought, in justice to have."

5. The PLEA of the general issue will in general enable the defendant to avail himself of any matter of defense, either arising from the illegality of the iusurance,—from an alteration of the policy after the execution,—from a noncompliance with some express or implied warranty or condition,—from the want of interest,—a misrepresentation,—a deviation or other like cause,—from a release,—or from a performance on his own part of the terms of the policy. But some matters of defense which are not favored in law, must be specially pleaded,—such as that the insured became an alien enemy after the making of the contract or bringing the action; or the statute of limitations, when the action is not brought till after the lapse of six years. When the insured was an alien enemy at the time of making the contract, this is matter of defense under the general issue; but when the disability accrues afterwards, the fact should be pleaded specially. Hughes Ins. 474. The plea is regarded strictly, and the court will not allow it to be pleaded with any other plea. ib. The plaintiff may reply that he was resident in this country by licence. The statute of limitations may be pleaded where the loss accrued within six years before the commencement of the action; and if the captain of a ship insured, barratrously carries her out of the course of the voyage, procures her to be condemned in a vice-admiralty court, sells her, and delivers her up to the purchaser, it is only from this last event that the statute of limitations begins to run as between the insured, and the underwriters. ib. There are also certain other common matters of defense, which, if they occur, must be introduced specially upon the record,—such as tender, or the bankruptcy of the defendant. So it should seem, the bankruptcy of the plaintiff, when that is material, and occurs after the commencement of the action, should be specially pleaded. ib. So a set-off must if any occur, be introduced by way of plea or notice. A set-off rarely occurs, unless either of the parties may have become bankrupt; in other cases it is not in general sustainable as the claim under a policy is a claim for unliquidated damages. And therefore where the plaintiff declared in covenant for a total loss on a policy of insurance effected in his own name

and averred the interest in one count to be in himself, and, in another, in himself and others, to which the defendants pleaded that a less sum was due on the policy than for a total loss, and set off monies due to them on the plaintiff's bond, made before they had notice that any other than the plaintiff was interested in the policy, these pleas were holden bad. ib.; 5 M. & S. 439.

6. *Of the Evidence upon the trial.*

Upon *the trial* the plaintiff must begin by proving every material allegation contained in his declaration. If any of the facts of the case on either side have been agreed to be admitted, these admissions are reduced into writing, and signed by the attornies on both sides, and, being read, they supply the place of actual proof. (2 Marsh. 712.) The rules of evidence are in general the same in trials upon policies of insurance as in other matters, and there appear to be no cases in the books containing points of evidence peculiarly applicable to trials upon policies of insurance against fire.

Policy.—The policy must be produced and proved because it is the best evidence of the contract. If the agent of the defendant subscribed the policy, the authority of the agent must be regularly proved; and this may be done by the person who subscribed as agent, or by the power of attorney, or other writings of the defendant, by which he was appointed; or it would be sufficient to show that the defendant has recognized his act on this particular occasion, or that he has recognized him on several other occasions as his agent for subscribing policies. 2 Phil. Ev. 36. *Neal* v. *Irving*, 1 Esp. R. 61. *Brockelbank* v. *Sugrue*, 5 C. & P. 21. In this last case, it was *held*, that a memorandum indorsed on a ship's policy of insurance for a change of voyage, and signed by an agent of the company, it was sufficient to prove that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though when a new policy was required, he always sent the proposals to the company:—and that the other policies on which such memorandums had been signed, need not be produced. If it appears that the agent was appointed by a power of attorney, and if there is no evidence of any recognition of the agent's authority, it seems necessary to produce the written authority. See *Johnson* v. *Mason*, 1 Esp. R. 89. In the case of a partnership, the confession of the members of the company would be good evidence of the authority of an agent. *Odiorne* v. *Maxcy*, 15 Mass. R. 39. And the confession of one member of the co-partnership, of any fact tending to bind the whole, is unquestionably good evidence against the whole. ib. But the authority of even a general agent must necessarily be restrained to the transactions appurtenant to the business of his principal, 13 ib. 181, S. C. Posterior adoption and ratification of the agent's acts, is equal to previous authority. *Fisher* v. *Willard*, 13 Mass. 379.

Where a power of attorney signed by the defendant was given to 15 persons by name, "jointly or separately, to sign and underwrite all such policies of assurance as they or any of them should jointly or separately think proper:" *Held*, that this was to be construed as a joint and several authority; and that

the plaintiff might maintain an action on a policy underwritten by four of the persons therein named. *Guthrie* v. *Armstrong*, 1 D. & R. 248; 5 B. & A. 628. *Semble*, that, under a power of attorney by A to B "to underwrite any policy of insurance not exceeding £100, and to subscribe to the same his (A's) name, and to settle and adjust losses," &c., although B cannot delegate his whole authority to another, yet, having signed a slip for the policy of insurance, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act, which he might authorise another to do for him, but he must himself execute the power in all matters in which his judgment and discretion are requisite. In the present case, the policy, after it was so executed by the clerk of B, having been shown to A, who then offered terms of settlement, it was held that A adopted the act of B. *Mason* v. *Joseph*, 1 Smith, 406. And where the agent of a corporation was appointed only by parol and received the premium in another state where his agency was, *held*, that the corporation was bound to indemnify the insured although the premium had not been received from the agent before the loss; and that it did not lie with the company arbitrarily to say they would not recognize the rate of premium, or would not be satisfied with the risk; and they were accordingly decreed to indemnify the assured. *Perkins* v. *Washington Ins. Co.*, 4 Cow. 645. In this case, no policy had been executed.

Interest.—Upon an issue, whether the plaintiff was interested in goods destroyed by fire, if a witness called by the plaintiff states that invoices of the goods, and letters of advice, purporting to be written by him at Edinburgh, were fabricated in London after the fire, by the plaintiff's direction, it is competent to the plaintiff to call other witnesses to disprove the alleged fabrication, and show the genuineness of the documents. *Friedlander* v. *London Ass. Co.*, 1 Nev. & M. 31.

Where the question was, whether a bankrupt had an interest in the goods insured at the time of the loss? It was held that the effect to be given to the stoppage of goods *in transitu*, was, to rescind the contract, and to revest the property in the original owners, so that the bankrupt after the stoppage *in transitu*, had no property in the goods insured; and therefore, his assignee could not support an action on the policy. *Clay* v. *Harrison*, 10 B. & C. 93.

A bill of lading, signed by the master, and indorsed to a *bona fide* holder by the consignee is a transfer of all interest in the goods to the indorsee: "it conveys the property upon a *bona fide* indorsement, in the same manner as a direct delivery would do, if so intended." Lord Ellenborough in *Newson* v *Thornton*, 6 East, 40. Though the assignment be made after the arrival of the goods in port. *Chandler* v. *Belden*, 18 John. 157. But a mere indorsement of a bill of lading, without a delivery of it, does not transfer the goods. *Buffington* v. *Curtis*, 15 Mass. 522. By a delivery of the goods to the master, of which the bill of lading is the evidence, the property vests in the consignee, subject only to be divested by the consignor, by the exercise of his right of stoppage *in transitu*, in case of the insolvency of the consignee, *Ludlow* v. *Bowne*, 1 John. 15, 16; *Potter* v, *Lansing*, ib. 215. The bill of lading is not *conclusive*

evidence of property. Thus, in an action of covenant on a policy of insurance, the defendants gave evidence that the property belonged to the plaintiff and another as stated in the bill of lading; and contended that the plaintiff was concluded from denying it: but the court said;—"The covering of property does not conclude the person interested, so as to estop him from proving the truth of the case. The *Maryland Ins. Co.* v. *Ruden*, 6 Cranch, 338. A bill of lading signed by a deceased master of a vessel for the delivery of goods to a consignee, is evidence of property in the consignee; it requires only proof of the master's signature. *Haddon* v. *Parry*, 3 Taunt. 303; and, if he is alive, proof of his signature will be equally sufficient for this purpose, though it would not be evidence of the shipping of the goods, as it would in the case of his death; but where the master, who had signed the bill, made a memorandum upon it, that the contents of the boxes were unknown, it was held, that the document was no evidence of an interest in the consignee. ib.

It seems necessary, also, in addition to the proof of the master's signature, and of that of the indorser, where the plaintiff's interest arises from the indorsement of a bill of lading, to give evidence of the shipping of the insured goods. Interest in a cargo is proved by the master or the mate, or other person at the time the articles were brought on board. *Peyton* v. *Hallett*, 1 Caines, 363. If the master has deceased, then the bill of lading is evidence of the shipment of the goods. *Haddon* v. *Parry*, 3 Taunt. 303; *Dickson* v. *Lodge*, 1 Stark. N. 226. Abstracts also from the books of merchants abroad have been admitted as evidence of the shipment of goods when supported by other proof. *Beel* v. *Keely*, 2 Yeates, 255. But the notarial copy of an agreement made in Philadelphia respecting the loading of a vessel insured, was rejected; the original being in the hands of an agent abroad. *Donatle* v. *Ins. Co. of North America*, 4 ib. 275. And letters of the captain were held to be sufficient proof, without the invoices or bills of lading. *Crousillat* v. *Ball*, 3 ib. 375. A copy of an official report of the cargo of a ship, made under legislative authority by an officer of the customs was admitted as proof, that the insured property was put on board. *Johnson* v. *Ward*, 6 Esp. 47. A clerk in the custom house testified that it was a copy of the official paper, which contained an account of the cargo, which has been examined by the searcher; the official paper goes with the ship, and the paper produced is kept at the custom-house; and Chambre, J. admitted it as a paper made by authority of an act of Parliament and lodged in the office of customs as an official document of the ship's cargo.

The Shippers of goods received orders before the declaration of war, but in consequence of embarrassments before executing the orders, made an assignment to their bankers for advances and requested the consignees to remit the amount to the bankers, the invoice being for account and risk of the consignees, but stating the property to be in the bankers: *Held*, that the property in the goods notwithstanding vested in the consignees; the same having been purchased and shipped in pursuance of their orders. The *Mary & Susan*, 1 Wheat. R. 25. To make the shipment of goods a delivery they must be shipped in consequence of some contract of sale. The *Frances*, 8 Cranch,

359, 418. In that case the property in the goods will vest in the purchaser, though consigned to another. But where the goods were consigned to the purchaser, and the bill of lading was sent to the agent of the shipper, with directions not to deliver the goods until paid, the property will continue in the shipper. The *Merimact*, 8 Cranch, 317; 1 Wheat. 208.

The bill of lading represents the property, and any *bona fide* title for valuable consideration obtained by a transmission or negotiation of the bill of lading, gives as valid and effectual title to the goods, as could be obtained by an actual delivery of the goods themselves. Per Shaw. C. J. in *Rowley* v. *Bigelow*, 12 Pick. 307. And although the original contract be fraudulent, yet where the purchase is accompanied by delivery of the goods, it is only voidable, at the option of the vendor; and in the meantime a *bona fide* purchaser from such fraudulent vendee will acquire a valid title to the goods. ib. Therefore, though the vendor in such case can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, he cannot as against a *bona fide* purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud, *Parker* v. *Patrick*, 5 J. R. 175. The same rule holds in regard to real estate. *Somes* v. *Brewer*, 2 Pick. 184. And where the delivery of the goods sold was on board of a vessel appointed by the vendee to receive them, not for the purpose of transportation to him, or to a place appointed by him to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business to a third person; Held, that such delivery was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end. *Noble* v. *Adams*, 7 Taunt. 59. *Rowley* v. *Bigelow*, *supra*.

Payment of money into court precludes defendants from objecting that the averment of interest is not substantiated. By Ld. Ellenborough, 16 East, 146. But payment to the amount of a partial loss in a valued policy is not an admission of a total loss. *Ruckster* v. *Palsgrave*, 1 Taunt. 419—3 ib. 162. And in an action on a valued policy, the payment of money into court upon a count which states a total loss, is not an admission of such total loss by capture. ib.

Payment of money into court generally upon a declaration containing a count on a policy of insurance, and the money counts, is only an admission of the contract, but does not preclude the defendant from disputing his liability, beyond such payment, for goods which were not loaded according to the terms of the policy. *Mellish* v. *Allnutt*, 2 M. & S. 106. In other words, the defendant may still insist that the loss complained of did not result from a breach of the particular contract. In a special count on a policy, the risk was stated to continue until the ship was unloaded, and there were common counts:—Held, that the premium having been paid into court generally was an admission of the contract stated in the special count. *Andrews* v. *Palsgrave*, 9 East. 325.

Payment of money into court in an action for work and labor generally, where full particulars were annexed to the record, shews only a liability for some work and labor, and is merely evidence which may be coupled with other facts, so as to shew a total or partial liability on the particular claim; and that the effect of such payment is not altered in this respect by the rule of Trin. 1 W. 4. which requires a particular of demand to be annexed to the declaration. *Measer* v. *Smith*, 4 B. & Ad. 47.

Proof of interest as averred.—A material variance between the interest, averred in the declaration, and that proved at the trial, is a ground of nonsuit. The allegation on whose account, and for whose benefit the policy was made, is a material allegation, and the statement ought to be strictly conformable to the fact. Thus, where the interest was alleged to be in a single person, and the policy purported to be made on his account, whereas in fact several were jointly interested, and the policy was made on their joint account, the variance was held to be fatal. 2 Phil. Ev. 41, 42 and *cases cited.* In this respect, there seems to be no essential difference between a fire and a marine policy; the insurer in either case is entitled to have it stated truly upon the record, whose interest the policy was to protect. But where an averment in a declaration on a policy was that A. B. C. D. and certain persons trading under the firm of Messrs. E. & F. & Co. were interested in the property; Held sufficient on a motion in arrest of judgment; but *quære*, whether the uncertainty as to the names of the persons who compose the firm is a ground of special demurrer. It is sufficient at the trial to prove that there is such a firm, without proving the names of the persons who compose the firm. *Wright* v. *Welbie*, 1 Chit. R. 49.

Where the policy was effected in the name of the agent, as agent for the plaintiff; and on the trial he sought to recover a loss for the use of third persons, who were alone interested in the property: Held, that the action could not be maintained. Parsons, C. J. observed—"The alteration of the policy from the old form, was because the assured would know the persons, for whom they would answer. But if any man having no interest, nor calling himself agent to excite the enquiry of the underwriters might cause himself to be insured, the intent and design of the alteration of the policy would be defeated, and the underwriters entrapped to insure the property of a man, whose property they must suppose they had not insured. *Russell* v. *The New England M. Ins. Co.*. 4 Mass. 82.

Variance.—The contracting parties should be named in the declaration. 3 Taunt. 106. In case of the omission of proper parties as plaintiffs, the defendant may plead the non-joinder in abatement; or avail himself of it, as a variance, under the general issue, to nonsuit the plaintiff, or if the defect appear upon the pleadings, may demur, or bring a writ of error, and where the action is founded upon a deed, may crave oyer and then demur. 2 Phil. Ev. p. 42 and cases cited in notes. The want of proper plaintiffs in actions on contract, is an exception to the merits, and is to be taken advantage of, either on demurrer, in bar, or on the general issue, but not by plea in abatement. Per Parsons, C. J., in 6 Mass. 460; 1 B. & P. 67. Where the title is not wholly in one, and where the right of action depends on a title, which is al-

leged to be in one, but is proved to be in two or more ; and it so appears by the pleadings, or in the progress of the suit ; the variance is fatal. 10 Mass. 377. The one plaintiff cannot recover his portion of the right, to which two or more are jointly entitled. Less defendants on the other hand is only in abatement. 1 B. & P. 73. *in notis.* See also 11 Mass. 420.

The averment of a joint interest is not supported by proof of a sole interest. Per Thompson, J. in 1 Paines' C. C. R. 615 ; 4 Mass. 647. But in *Foster* v *U. Ins. Co.*, 11 Pick. 85, where G. B. & M. were the owners of the vessel and also jointly interested in the property on board, and the policy was " cause F. T., *for the owners of brig Sampson*, to be assured," &c. ; and the declaration averred that G. B. & M. were the owners of the vessel to the amount of —— ; and G. was solely interested in property to the amount of —— : *Held*, that in such case both the joint and separate property of G. was matter of evidence :—But there being no evidence that the other part owners ordered any insurance or adopted the same after it was effected, they were not insured, and therefore were entitled to recover the premium under the count for money had and received. See the observations of Oakley, J. in *De Forest* v. *The Fulton F. Ins. Co.*, 1 Hall, 84, 136. In this case, the policy was " as well the property of the assured, as held by them in trust or commission, contained in store No. 82, South Street ;" and the declaration contained a count averring " that the plaintiffs were possessed of divers goods and merchandise *as well the property of the assured, as held by him in trust or on commission*, to the amount, &c. to the *damage of the plaintiffs*, &c. : Held, that proof that the plaintiffs had the goods on commission for sale, as factors, was a sufficient proof of the averment of interest.

In a restricted policy, in which the insured is named in the policy, the interest must be averred and proved to be in the person named in the policy. 2 Cranch, 419 ; 2 Mason, 369.

Every material averment in the declaration must be proved ; one of the most material is that of the truth of such warranties as constitute conditions precedent ; as the delivering in an account of the loss and damage to the office, with evidence in support of it, according to the rules laid down by the respective offices ; the construction of the buildings, if the question be raised ; and the nature of the property insured. (Ellis, p. 94.)

The accident of fire, which was the cause of the loss or damage, must also be set forth in the declaration, and proved, if not admitted, as it generally is ; the loss or damage must be shown ; and the loss or damage must appear to have happened during the continuance of the risk. ib.

Opinion.—In regard to the admission of the opinion of an insurance broker as to the materiality of the facts not communicated.

In *Carter* v. *Boehm*, 3 Burr, 1905, Ld. Mansfield thought that such evidence was inadmissible. So also thought Ch. J. Gibbs in *Dayrell* v. *Bederley*, Holt, 283.

In an action on a fire policy, the question before the court was, whether *the accounts of stock* had been made *bona fide* at the time they purported to bear date ;—the books were before the court & jury ; and the court refused to

admit evidence of persons *skilled in hand writing* in regard to the time when the accounts purported to have been made: Held, that the evidence was not admissible. *Phœnix Ins. Co.* v. *Philip*, 13 Wend. 81.

It was ruled also, that the opinion of others that other dealers in the same articles had much less stock, with a view to show fraud, was not admissible. ib.

Where the subject of inquiry is not a matter of skill or science, but simply a question of fact which the jurors are as competent to decide as the witnesses, the opinion of underwriters is not admissible. Thus, in *Jefferson In. Co.* v. *Cotheal*, 7 Wend. 72, where the insurance was upon a *steam saw-mill*, after policy was obtained, the insured enclosed the *boiler* with a wooden covering, it being on the outside; and the question was whether the risk was thereby increased; and held, that the opinion of underwriters who had not seen the building and who had particular science in the construction of such buildings, was not admissible in evidence.

In a late case, (*Rickards* v. *Murdock*, 10 B. & C. 527,) it was held, that the opinions of underwriters were admissible to show the materiality of the facts not communicated at the time of effecting an insurance—Ld. Tenterden saying,—"I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry." This opinion was adopted in *Chapman* v. *Walton*, 10 Bing. 57, where the policy had been effected by a broker; and on the trial of the action sued against the broker, the plaintiff's counsel contended that it was the defendant's duty to have procured the insertion of "liberty to proceed or touch at any of the Canary Islands." The defendant's counsel, on the other hand, called several policy-brokers, and putting into their hands the policies, the bills of lading, and invoices of the goods, and the supercago's letter, asked them *what alterations of the policies a skillful insurance-broker ought, in their judgment, to have procured, having these documents in his possession, and being instructed to do the needful.* The answer being for the defendant as well as the verdict, the court discharged a rule for new trial, moved on the ground that this evidence had been improperly admitted. The Ch. J. in delivering the judgment of the court observed,—"But it is not a simple abstract question, as supposed by the plaintiffs, what the words of the letter mean; it is what others conversant with the business of a policy-broker would have understood it to mean and how they would have acted under it under the same circumstances."—He concluded by saying,—"The decision in this case appears to be consistent with the principle laid down by Mr. Justice Holroyd, in *Berthon* v. *Loughman*, 2 Star. N. P. 258, that a witness conversant with the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium—a principle which has been confirmed by the case of *Rickards* v. *Murdock*, 10 B. & C. 527; and it is difficult to reconcile the opinion given by Ld. Ch. Justice Gibbs, in the case of *Durell* v. *Bederly*, Holt, N. P. C. 283, with the judment of the Court of King's Bench in the case last referred to. We think, therefore, both on principle, and on the authority of the decided cases, the evidence was properly admit-

ted." In a subsequent case, which arose out of the same transaction as *Rickchards* v. *Murdock*, it seems to have been considered that the evidence is inadmissible. *Campbell* v. *Richards*, 5 B. & Adol. 840.

The question, therefore, of admissibility can hardly even now be considered as settled; for opposed to the decision of the King's Bench in *Campbell* v. *Richards*, is the opinion in *Rickards* v. *Murdock*, recognized by the Court of Common Pleas in *Chapman* v. *Walton*, 10 Bing. 57. "The difference is, however, (says a learned writer, Smith's L. C. 286,) less upon any point of law than on the application of a settled principle to certain states of facts; for, on the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissisible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowlegde of it; see *Folkes* v. *Chadd*, 3 Dougl. 157; *R.* v. *Searle*, 2 M. & M. 75; *Thornton* v. *R. E. Assurance Co.*, Peake, 25; *Chaurand* v. *Angerstein*, Peake, 44; while, on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. Now, the question of materiality in an insurance seems one which may possibly happen to fall within the above two classes, for, setting out of the question the case of life-policies, where the material evidence is unquestionably scientific, and necessary to enable the jury to come to a right conclusion, it is submitted that it may happen, even in cases of sea-policies, that a communication, the materiality of which is in question, may be one respecting the importance of which no one except an underwriter can, in all probability, form a correct opinion. If such a case were to occur it possibly would not be considered as falling within the decision in *Campbell* v. *Richards*. In that case the facts concealed were of the very simplest nature; a vessel which sailed after the one insured, had arrived 39 days before it; and it was easy without much experience in the business of an underwriter to divine the probable fate of the ship insured under those circumstances."

CHAPTER X.

OF ASSIGNMENT OF POLICIES.

1. *Assignment in general.*—Upon reasonable principles, offices should have the power of exercising a discretion in the selection of the persons whose property they may be called to insure, and of late years frauds and fraudulent claims upon fire offices have been so frequent, and to so large an amount, that an attention to the character of the party proposing to insure, has become a subject of considerable importance.

Policies against fire are personal contracts with the assured; and they do not pass to an assignee or purchaser without the consent of the underwriters. *Lynch* v. *Dayrell*, 3 Bro. P. C. 497. *The Sadlers' Company* v. *Badcock*, 2 Atk. 554; and the Chancellor, in 16 Wend. 397. If the assured, therefore, sells the property and parts with all his interest therein before the loss happens, there is an end of the policy unless it is assigned to the purchaser with the assent of the company; or if he retains but a partial interest in the property, it will only protect such insurable interest as he had at the time of the loss. ib.

Without reference to illegality, it would be highly dangerous to permit any trafficking in policies against fire, and offices would be extremely negligent of their duty to the public if they consented to pay upon a policy where there was no accompanying interest. The English policies contain a provision in the printed proposals, that upon the death of an insurer, his interest in the policy shall be continued in his representative, to whom the property belongs, provided such representative, before any new payment be made, procure his right to be indorsed on the policy at the Office. See Ellis, p. 69.

The insurers, in assuming the risk, provide for the continuance of the assured's interest in the property covered, so long as their liability continues. But when the property is alienated, that is, when the assured is divested of title by sale or in any other manner, the policy becomes a nullity. Upon general principles applicable to fire insurance, the person insured cannot convey the estate insured and assign the policy, so as to render it valid in favor of the grantee and assignee, unless by consent of the insurer. But where the act of incorporation of a mutual insurance company provided that "when the property insured shall be *alienated* by *sale or otherwise*, the policy shall thereupon be void," &c.; and the property insured was a store and stock of goods; and a sale having been made of the goods, a verbal lease was given of the store; but before the time in the policy had expired, the insured took back both the

goods and store: Held, that this was not an alienation of the store; at most it was only a tenancy at will and so no alienation, which means a transferring of the *property* of a thing to another. *Lane* v. *Mutual Fire Ins. Co.*, 3 Fairf. R. 44. The policy was intended to cover and did cover whatever goods the plaintiff might have in his store, at any time during the continuance of the risk, not beyond the amount actually insured, without being confined to such goods as were in the store at the time of assuming the risk; there being no difference in principle between the case where the quantity is diminished by a partial sale and then replenished, and where the whole is sold and an entire new stock purchased. Per Parris, J. in ib. In either case there is a risk, limited in amount by the contract, which was assumed by the insurer, and for which the insured has paid the stipulated premium.

If the assignment be absolute, so that no property or interest remain in the plaintiff at the time of the loss, then, according to decided cases, the contract is avoided. The plaintiff cannot recover, because he has suffered no loss, and the assignee cannot recover, because he is no party to the contract. *Carroll* v. *Boston Mar. Ins. Co.*, 8 Mass. 515; *Locke* v. *North Amer. Ins. Co.*, 13 ib. 61; *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 Pick. 249. But in these cases it is decided, that notwithstanding a conveyance, if it be in the nature of a mortgage, or in trust with a resulting trust to the insured, so that he has in truth an insurable interest in the property, he may nevertheless recover to the extent of his actual loss. Per Parker, C. J., in *Lazarus* v. *Commonwealth Ins. Co.*, *supra*. However, where the assignment was upon condition, that the creditors, for whose benefit it should be made, should release and discharge their debts, and they were so released and discharged, this changes the transaction and takes from the plaintiff all interest in the property; except, by the assignment, the plaintiff has the surplus, if any should remain after paying the debts; and it be shown that the property conveyed is of greater value than the debts, and that a discreet appropriation of it will leave a surplus. ib. If notwithstanding the assignment a subsisting interest remain in the insured; as in the case of a conditional transfer to secure a debt or a liability, he continues to be interested so as to have a right to recover in case of loss; although the mortgage or pledge be to the full value. *Gordon* v. *Mass. F. & M. Ins. Co.*, *supra*. The deposit of the policy gives a lien on it at law. *Wells* v. *Archer*, 10 S. &. R. 412.

Where the right in equity to redeem a house under a mortgage, was sold on execution: *held*, that as the law provided for a still further right to redeem, he had an insurable interest in the house. *Strong* v. *The Manufacturers' Ins. Co.*, 10 Pick. 40. This right might be a valuable interest; and no evidence was offered to show that it was not.

Although a person may have become possessed of the premises or goods before the time of the fire, if the policy which covers them be assigned to him after the fire happens, and without the consent of the office, he cannot recover. In the language of Ld. Ch. King in the case of *Lynch* v. *Daryell*, *supra*, *these policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office.* And the same doctrine was recognized by Ld. Hardwicke in the subsequent case of *The Sadlers' Co.* v. *Badcock*, 2 Atk. 554.

We may here observe, that as policies against fire cannot be assigned so as to entitle the assignee to demand the sum insured without notice to the office, (1 T. R. 22 and 745); in this respect they appear to differ from marine policies, in which the contract of insurance is more specially applicable to the property insured rather than to the owner of it. Before the st. 25 Geo. 3 C. 44, marine policies were commonly in blank as to the insured; and the subsequent st. 28 Geo. 3 C. 26, though it restrains the making of policies in blank as a general rule, renders it necessary only to insert the name of one or more of the persons interested in the property insured, or of the consignee or consignees, or of the person resident in Great Britain who shall receive the order for or effect such policy, or of the person who shall give the order to the agent immediately employed to negotiate or effect such policy.

The right to assign or give the benefit of a marine policy, when the property has been transferred also, does not appear to have ever been disputed. (1 T. R. 22, 745.)

Another distinction may also be observed between marine policies and those against fire. It is sufficient if a marine policy be effected after the interest in the property commences, if it be made in time to meet the risk insured against; (*Rhind* v. *Wilkinson*, 2 Taunt, 237;) for the st. 14 Geo. 3 C. 48, s. 1, does not extend to marine policies, and such a restraint would be highly prejudicial to commerce; but, it appears both by the decisions anterior to the statute, as well as by the statute, that the insured must have an interest in the property at the time of effecting the insurance against fire, as well as when the loss happens.

If the insured parts with his interest before the loss happens, so that he has no legal or equitable interest left, he cannot recover. 2. Pick. 249. So after stoppage of goods *in transitu*, the vendee ceases to have an insurable interest in the goods. *Clay* v. *Harrison*, 5 M. & R. 17; 10 B. & C. 99. And a policy effected before becomes thereby void. ib.; and see No. 1463 Greenl. Cas. overruled.

2. *Assignment of Policy after the fire happens, with possession of the property insured before the Fire.*—The restriction in the policy, against an assignment of the interest of the assured in it, without the consent of the company, evidently applies to transfers made before the loss happens. Therefore, where the insured after the loss made an assignment of his property, for the benefit of certain creditors; and assigned, among other things, his claim on the defendants: Held, that the transfer did not make the policy void. *Brichta* v. *The N. Y. Laf. Ins. Co.*, 2 Hall 372.

3. *Suit by Assignee.*—If the act of incorporation provides that the *assignee* of the insured may sue in his own name, such assignee must aver that he has become the purchaser or assignee of the subject insured; a general averment of the plaintiff's interest is insufficient. 5 Wend. 200.

CHAPTER XI.

OF PROCEEDINGS IN EQUITY.

1. *Equity Jurisdiction.*—Courts of equity, sometimes in cases of insurance, as in all others, interpose their authority for the purpose of advancing justice; thus they will compel a trustee to permit his name to be used by the cestui que trust in an action on a policy of insurance, Per Ld. Hardwicke, 1 Atk. 547; or they will issue commissions for the examination of witnesses residing abroad, or out of the jurisdiction of the court, and grant injunctions to stay the proceedings at law until the return of such commissions; (*Chitty* v. *Selwin*, 2 Atk. 359,) or they will compel a plaintiff at law to make a full discovery by his answer upon oath of all the circumstances within his knowledge touching the matters in question, and the answer may be given in evidence at the trial of the action; or they will compel a plaintiff at law to deliver up or permit an inspection of all papers and documents which are material to the matter in dispute; (3 Bro. P. C. 525; 2 Marsh. 685) except, however, in such cases, and those in which policies or the proceeds may be affected by a trust, Courts of Equity have no jurisdiction.

Mistake in Policy.—If the policy is not filled up according to the intention of the parties, through inadvertence or mistake, a court of equity may, upon clear and positive evidence of such inadvertence or mistake, correct the policy. Per chancellor in *Dow* v. *Whetten*, 8 Wend. 160, 166. In such a case the application for insurance may be used in the court of equity, in connection with the evidence, for the purpose of showing the mistake and reforming the policy.

If the premium had been paid to the agent authorized to receive it, and the president, secretary, or agent, has signed a receipt therefor, the insurance is as binding as if a policy had been executed. In such case however, the assured instead of suing in a court of law, will be obliged to resort to a court of chancery, in case of a loss. *Perkins* v. *Washington Ins. Co.*, 4 Cowen, 645. Thus, it appeared that the agent of the company was authorised to accept propositions for insurance, and also to receive premiums; and it further appeared that the company had given notice that when the premium was paid, the insurance was to be considered as binding: Held, that the contract was consummated, although the agent had delayed remitting the premium until after the loss. ib.

2. *Of Equities attaching upon policies.*

It may be sufficient to state, that at present it appears that no equity attaches upon the proceeds of policies in favor of third persons, unless there be some contract, or agreement, or trust to that effect. A policy of insurance against fire is a distinct independent contract between the party effecting an insurance and the insuring.

(*a*) *In general, no equity between landlord and tenant.*—In *Brown* v. *Quilter* Amb. 619, the plaintiff leased premises of the defendant for a term of years, and in the lease covenanted to repair, &c. (*accidents by fire excepted,*) the defendant, covenanting in the usual manner for quiet enjoyment; the house was burnt down, the defendant having insured for £500 and received the insurance money. The defendant neglected to rebuild the house, and the plaintiff refused to pay the rent, which become due after the house was burnt; and the defendant having brought an action for the rent, the plaintiff brought a bill for an injunction, and to compel the defendant either to *rebuild the house* or *pay the insurance money* to the plaintiff towards satisfaction of his loss. The defendant insisted upon *his right to the insurance money,* and to be *paid the rent without rebuilding the house,* but offered to discharge the plaintiff from his lease Lord Northington, (Ld. Chancellor) *seemed* to be of opinion, that in this case though the covenant did not extend to oblige the defendant to rebuild, yet that when an action is brought for rent after the house is burnt down, that was a good ground of equity for an injunction till the house was rebuilt. The case, however, was afterwards compromised, and it does not amount to a decision; whatever of authority may attach to it, has been very much shaken by *Hare* v. *Groves,* 3 Anstr. 687, and *Holtzapfell* v. *Baker,* 18 Ves. 115.

Brown v. *Quilter,* however, differs from these latter cases, inasmuch as the landlord, who had insured, had received the insurance money, and therefore had the value of the thing, which was the subject of the contract with the lessee, and as to him therefore no loss had happened. But, as was urged in argument in *Holtzapfell* v. *Baker,* it is extremely difficult to conceive how that distinct contract, merely for the advantage of the lessor, with which the lessee had no concern, can effect the right as between them. It was thrown out by the Ld. Chancellor (Eldon) in the course of the argument, that "some of the fire officers reserving the option of paying the money or laying it out themselves, which may make a considerable difference, as that option ought to affect the lessee;" but to this it was objected, that this option is reserved merely for *their own protection* against fraud, and not for the benefit of the tenant. Although the cases cited do not go precisely to the point of equities attaching upon policies, but to the question of payment of rent by lessees for premises after they have been burnt down, yet from the observations scattered in them, we may come to the conclusion, that the contract of insurance is confined to the parties, and that as a general principle, no other person has any right in equity to the proceeds.

The doctrine has been confirmed in a much later and stronger case. *Leeds* v. *Chatham* 1 Sim. 149. The defendant by indenture of March 25, 1810, demised to the plaintiff a cotton factory, with the steam-boiler, for twenty one years, &c., reserving a yearly rent: the plaintiff covenanted to pay *the rent* during the term, and to *repair* and *keep repaired* the *inside* of the factory, the offices, fixtures, out-houses, and additions, and the steam-boiler, engine, and apparatus thereto belonging, so long as the same would last, or could be rendered workable by repair; the defendant covenanted to maintain the *outside* brick work, plastering, slating, tiling, and all other *outer* parts of the premises in good substantial and tenantable repair. There was *no exception* in respect of *accidents by fire* either in the covenant for payment of rent, or in the covenant to repair, on June 22, 1825, the factory, buildings, and premises were destroyed by fire. After the lease was granted, the defendant insured the factory and buildings for £500., the steam-engine for £100., the engine-house for £60., and the gearing for £40., so that the total amount of the sums insured was £ 700.; and shortly after the fire he received that sum. The defendant had commenced an action against the plaintiff for a year's rent, ending the 24th of June, 1826. The bill prayed that it might be declared that the defendant was bound to lay out and apply the £700., or a competent part thereof, together with the old materials, in and towards the rebuilding, and reinstating the factory and premises, the steam-boiler, steam-engine, &c., and that he might be decreed forthwith to lay out the same accordingly, the plaintiff offering to make good out of his own monies, what the £700 and the old materials should be insufficient for the purpose, to such extent as he should be deemed liable; and that it might also be declared, that the plaintiff was not bound to pay the rent during such time as the factory, &c., should continue unbuilt and unrestored; and that the defendant might be restrained from farther proceeding in the action. The defendant demurred to the bill for want of equity.

The Vice Chancellor.—"There being in the lease no exception as to the case of accident by fire, the plaintiff at law continues bound also by his covenant to keep in repair the inside work of the factory, the steam-engine, and the other apparatus, and all the out-buildings and fixtures which were on the premises. On the other hand, the defendant, for want of the exception as to accident by fire, continues bound by his covenant to repair the outer part of the buildings, and also by his covenant to replace the steam-boiler and other apparatus during the last fourteen years of the term, and when from long use they are no longer workable, under these covenants, the defendant is bound to rebuild the factory, and to cover the same with proper roofing, and slating or tiling; and the plaintiff is bound to rebuild the out-buildings, and to do all necessary works to complete the inside work of the factory when it is built and covered in by the defendant. It appears to me, that in this respect, equity must follow the law. The plaintiff might have provided in the lease for a suspension of rent in the case of accident by fire, but not having done so, a Court of Equity cannot supply that provision which he has omitted to make for himself; and it must be intended

that the purpose of the parties was according to the legal effect of the contract, *with respect to the equity*, which the plaintiff alleges to arise from the defendant's receipt of the insurance money, *there is no satisfactory principle to support it.* The defendant, having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle is the plaintiff's situation altered by the precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant, and to those covenants he must alone resort."

(b) If the insurance money, as secured by a policy against fire, is made payable to the insured, his *executors, administrators,* and assigns; and houses and buildings in fee are insured, which afterwards descend to the heir, and are burnt during the continuance of the policy. The executors of the insured, and not the heir, will be entitled to receive the proceeds of the policy. A decision *Mildmay* v. *Holgham*, 3 Ves. 472, to this effect has been made with reference to the constitution and policy of the Hand in Hand Office, by one of the articles of which it was declared, that the interest of a member dying should survive to his executors, administrators, and assigns; and by an order of the society, reciting that every insurance became void at the time when the property of the person insured expired, it was ordered, that upon applying at the office and declaring their property in the houses insured to be expired, any persons may have their accounts adjusted and deposites due paid to them; and that if they do not apply nor assign the policy to the person having the property of the house insured, the person possessed of the property may insure the house notwithstanding the former policy be not expired. The policy was made payable to the insured, her executors, administrators, and assigns; and it was declared, that when any assignment of the policy be made, such assignment should be entered in the office books within forty-two days, or else the assignee shall have no benefit. Under the circumstances before mentioned certain houses had descended to the heir, one of the houses was burnt, the policy not being expired, and no assignment to him had been made, the directors of the office refusing to pay upon his application; he filed his bill, which was dismissed with costs. It was contended, amongst other points, that the executor was a trustee for the heir.

The Lord Chancellor.—"It is utterly impossible to make the executor a trustee. It seems to me perfectly clear upon the plan of this society, which was formed in 1696. In general, however, policies are not made payable to the insured, his heirs, &c., but to the executors, administrators, &c. that it is not like the other insurance offices since established, but that it is a personal contract not connected with the real property nor affecting the real property. No person can have the benefit of the policy but the personal representative, with whom they make up the account, and who is entitled to the dividend."

(c) If, however, by the act of the insured, or the party entitled to the benefit of the proceeds of the policy, those proceeds should become clothed with

the character of real estate, (*Norris* v. *Harrison*, 2 Mad. 268) or with a *trust*, the party entitled to the real estate, as heir or devisee, will become entitled to them, in preference to those who may claim them as personalty.

As where A was tenant for life, remainder to B for life, remainder to A in fee, and during the life of A., houses on the estate, insured by him, were burned down, and the insurance money was paid to A, and was placed by him in the funds in his name. A by his will devised the estate to C in fee, (subject to B's life,) and his personal estate to B, and made B his executor, B applied part of the insurance money to repairing a house upon the estate; the insurance money unapplied remained standing in A's name. B, by his will bequeathed the residue of his personal property, after stating the circumstances as to the fund standing in his name, as follows: "Whereas, I am sole executor under the will of my brother, John Bell, Esq. late of Fluyder street, Whitehall, deceased, and there is now standing in the books of the Governor & Company of the Bank of England the sum of 1159*l.* 16*s.* 7*d.* Three per cent. Reduced Bank Annuities, I hereby inform my executor & sister, Mrs. Lucy Bell, that the said sum is part of and belongs to what was the real estate of the said John Bell, of which real estate I am now possessed as tenant for life, &c.; and I do further declare for the information of my executors and others whom it may concern, that the said sum is the balance or remainder of monies paid by the Sun Fire Office to the said John Bell, for houses belonging to the said real estate, which were burnt down in the life time of the said John Bell, and were not rebuilt by him; and which monies so paid to the said John Bell were by him laid out in the purchase of 2817*l.* 5*s.* 7*d.* Three per cent. reduced annuity, out of which last mentioned sum, after the decease of the said John Bell, when the house, No. 128, in Leadenhall street, then belonging to me, was burnt down, I took the sum of 1657*l.* 9*s.* Three per cent. Bank Annuities, and with the produce of that sum added to the sum of £1125 Sterling, which I received from the Hand in Hand Insurance Office for the said house, I built the present house, No. 128, in Leadenhall street, to the great improvement of the said estate," &c. The testator then bequeaths several sums of Bank stock, but not otherwise than aforesaid referring to the sum of 1159*l.* 16*s.* 7*d.* Three per cents.: and it was held, that under these circumstances the sum was subject to the uses of the settlement, and passed to C. the devisee in fee.

So where a testator had devised and bequeathed all his real and personal estate to the defendant, the executrix, charged with an annuity to his widow, who filed a bill for an account and security of the annuity, and a house, the only real estate, was burnt down after the filing the bill, having been insured by the testator in his life time, and the policy having been renewed by the defendant; the Court (the Vice Chancellor) ordered the insurance money to be paid into Court, it being to be taken that the defendant had renewed in the character in which she was entitled to renew, viz. as executrix, and the proceedsas affected with a trust for the benefit of the parties interested in the estate. *Parry* v. *Ashley*, 3 Sim. 97.

(*d*) *Of Equitable Subrogation or Substitution.*

The principle of equitable substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance, and is constantly acted upon in courts of law as well as in equity; so that where the assured has any claim to indemnity for his loss against a third person who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them for such loss, *pro tanto*. Or if he obtains payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriters who had paid the loss. Per Chancellor, in 16 Wend. 397, 8; *Gracie* v. *The New York Ins. Co.*, 8 J. R. 246; *Godsall* v. *Bolders*, 9 East, 72. In the case of *Mason* v. *Sainsbury*, referred to as a manuscript case by Mr. Marshall in his treatise on insurance, 2 Condy's Marsh. 794, and which is recognized as good law in the recent case of *Clark* v. *The Inhabitants of Blything*, in the court of K. B., the assured, who had received his whole demand from the underwriters for the loss sustained by a fire, was permitted to recover the same from the inhabitants of the hundred who were also liable to him upon the statute; or rather the underwriters were permitted to recover the same in his name, the suit being prosecuted for their benefit. The same principle as to the equitable right of the insurer to be subrogated to all the rights and remedies of the assured to obtain compensation for his loss from other persons, was acted upon by the Vice Chancellor in the recent case of *The Atlantic Ins. Co.* v. *Storrow et al.*, where an attempt was made, by the master and owners of the vessel who were primarily liable for a loss of goods by thieves, to throw the loss upon the underwriters, and to deprive them of their remedy over against those who were liable to the assured to make good the loss; and the decision of the Vice Chancellor in that case was affirmed upon appeal. See 5 Paige's R. 285; 2 Phil. on Ins. 282. In the case in Paige, the insurance was against loss by theft:—Held, that though the ship-owner or master was liable for the loss as well as the underwriters; yet, the former have not a claim in equity upon the latter for contribution; the assurers not being liable to contribute for a loss, for which the master or ship-owner are also liable to the assured;—their contract is a mere contract of indemnity to the assured. If the assured has received satisfaction in such case from the ship-owner, the latter cannot even upon an assignment of the policy recover against the insurers. The Chancellor also observed,—(p. 294) "And upon an abandonment and payment, or upon a recovery, as for a total loss, the underwriters are entitled to subrogation, at least in equity, to all the rights and remedies which the assured has to the property which is not actually destroyed, including the *spes recuperandi* from any other source; unless the underwriters have relinquished that right by a stipulation in the policy." Again—"If it happened upon the trial of the suit at law that the assured had received a compensation for his loss from the ship-owners, or the master, and that the

assignment was made for their benefit merely, to enable them to recover back the amount of the insurance from the underwriters on the policy, there can be no reasonable doubt that it would have been a good defense at law, at least to the amount thus received." It *seems* also, that if the assured should discharge his claim against the master or ship-owner, in such case, after a judgment recovered against the underwriters, the latter would be entitled to relief in a court of equity against the judgment; the judgment, in equity, must be considered as satisfied *pro tanto*.

In *Mapes* v. *Coffin, et al.*, 5 Paige's Ch. R. 296, previous to the revised statutes, a creditor who recovered a judgment against executors and levied his execution upon the personal property of the testator; and the property was subsequently destroyed by fire:—Held, that the judgment creditor was entitled to priority of payment out of the insurance money; the money due upon the policy being legal and not equitable asssets.

Where a riotous demolition by fire had taken place under stat. 1 Geo. 1. C. 5, and the office paid the loss to the insured even without suit, it was held that the office had a right to stand in the place of the insured, and to proceed against the hundred on the above-mentioned statutes, to recover satisfaction for the damage sustained in the name of the insured. *Mason* v. *Sainsbury*, 2 Marsh. Ins. 796; Ellis, p. 45, 46. Ld. Mansfield said the act puts the hundred in the place of the trespassers; and, on principles of policy, I am satisfied that it is to be considered as if the insurers had not paid a farthing. Mr. J. Willes said, "I cannot distinguish this from the case of an escape. Though the hundred is not answerable criminally, yet they are not to be considered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Justice Buller said, "Whether this case be considered on strict or on liberal principles of insurance law, the plaintiff must recover. Strictly no notice can be taken of any thing out of the record. The contract with the office, if strictly taken, is a wager; literally, it is an indemnity. But, on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted that the hundred is put in the place of the trespassers. How could the trespassers have availed themselves of the satisfaction made by the office? It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle is, that the insured and insurer are as one person, and in that light the paying before or after can make no difference."

The subsequent statute 7 & 8 Geo. 4. C. 31, s. 2, repeals the former statutes and make the liability of the hundred, &c. depend on the performance of certain conditions; such as the making of a statement of the circumstances under oath *within seven days after the commission of the offense, &c.*

The 30th section of the stat. states that what it is that constitutes a *felonious demolishing, pulling down*, or *destroying*, which entitles the sufferer to his remedy against the hundred.

CHAPTER XII.

DOUBLE AND RE-INSURANCE.

Double insurance is where one insures the same thing twice over, against the same perils. Putnam, J. in 12 Mass. 214. Re-insurance is a valied contract. 17 Wend. 359.

By the continental law of Europe, and by the English law of insurance as it existed previous to the decision of Lord Mansfield in *Newby* v. *Reed*, 1 W. Black. R. 416, if there were several policies of different dates upon the subject, and the amount of insurable interest was insufficient to cover the whole amount insured in both policies, so as to constitute a case of double insurance, the second policy only attached upon or covered so much of the insurable interest, as was not covered by the first policy; and the second underwriter was only entitled to retain the premium *pro tanto*, where the commencement and termination of the risks and the perils insured against were the same. 3 Kent's Com. 281. Vanderlinden's Comm. 655, b. 4, Ch. 16, s. 7. Millar on Ins. 266. By this ancient English rule and the continental law, the second underwriter was, as he always ought to be, merely substituted in the place of the assured, as to the uninsured interest of the latter, which was not covered by the first policy; so that the rule of apportionment between the first and second sets of insurers, where the policies when taken together were sufficient to cover the whole insurable interest, was precisely the same as it would have been between the underwriters in the first policy and the assured, if the second insurance had not been made. If the object of the American clause was to restore this ancient rule of apportionment between the underwriters in successive policies, as it originally existed in the mercantile law of England as well as the rest of Europe, it was hardly possible to do it in more appropriate and explicit language than is used in the last paragraph of this clause. That language is that in case of an insurance subsequent in date to the first policy, the underwriters in the first policy "shall nevertheless be answerable for the full extent of the sum by them subscribed, *without right to claim contribution from such subsequent insurers*, and shall accordingly be entitled to retain the premium by them received, *in the same manner as if no subsequent assurance had been made;*" that is that they are to have no right to claim a contribution from the subsequent assurers, and are to be answerable to the same manner, as if the subsequent insurance had not been made, as well as to retain the premium in the same manner." Per Chancellor in *Amer. Ins. Co.* v. *Griswold*, 14 Wend. 399, *in error*. Ch. J. Savage in delivering the judgment of the Supreme Court after examining the different decisions upon this subject in this country concludes by saying:—"it will be seen that the courts have understood the ob-

ject of the prior policy clause to be to restore the right of parties to what they were before Lord Mansfield introduced the doctrine of contribution. Previous to that time, the law was in England as it now is, and then was in all the commercial states of Europe; that where there are several policies, of different dates, upon the same subject, the oldest policy must be first responsible to the amount insured; and of course is entitled, in case of over-insurance, to retain the premium."

Where the stipulation in the policy was in these words: "The insured shall not in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained, than the amount insured bears to the whole amount insured on the property."—*Held*, that the plaintiffs were entitled to recover only a rateable proportion of each of the insurers; *Lucas* v. *Jefferson Ins. Co.*, 6 Cowen, 635.

The fact of a subsequent insurance upon the same property cannot affect the rights of the real plaintiff; for the nominal plaintiff cannot release defendants. By Jones, C. J., in 1 Hall 103.

Where the assured assigns his policy upon buildings to the mortgagee, with the assent of the insurers; and the assignee or mortgagee obtains a judgment *in the name of the assured;* but instead of enforcing payment of such judgment, proceeds to foreclose the mortgage: Held, that the assured was entitled to the benefit of the judgment against insured, although it appear he had effected another insurance subsequent to the assignment to the mortgagee. *Robert* v. *The Traders' Ins. Co.*, 17 Wend. 631. The assignee had only a collateral interest for the time being; but had the case shown that the policies were given to the mortgagee to secure him the payment of his mortgage, the payment of the mortgage would have released the company from their liability, for that would have put an end to the risk; the payment of the mortgage, in that case, being the only thing insured. The case would then have fallen within the principle settled in *Goodsall* v. *Baldwin*, 9 East, 72, and in *Hamilton* v. *Meads*, 2 Burr, 1210; in the language of Ld. Mansfield in the latter case, "the plaintiff's demand was for an indemnity, his action then must be founded on the nature of his damnification as it really is at the time of the action brought." But in the case in Wendell the nature of the damage was the destruction and loss of the buildings of Robert by fire, and for that loss and damage the company, by their policies, had covenanted to pay Robert or his *assigns;* and in consideration Robert paid the premium. Now although he assigned the policies to his mortgagee, and thereby gave him a right to recover against the company the damage sustained, if it accrued while he was assignee; and although the damage did accrue, and although a judgment was recovered against the company for the damage, yet the company not having paid that judgment, or the mortgage for the payment of which the policies were assigned, the assured was entitled to the benefit of the judgment. Robert having been *compelled* to advance the amount of the judgment on the mortgage did not thereby subject himself to have the same defense set up against him, by way of avoidance, which might have been set up had he continued to be the owner of the policies. He was not the owner of the policies when he

effected the second policy, and therefore was under no obligation to give notice thereof. The assignee was then the owner, and the supreme court have decided that the omission to give notice of the second policy was not, under the circumstances of the case, a good defense; that judgment has been acquiesced in by both parties; and as no other action can be brought for the same liability, it could not be a defense any where. ib.

Upon a double insurance, though the assured is not entitled to two satisfactions, yet in the first action, he may recover the whole sum insured, leaving the defendant to recover a rateable satisfaction from the other insurers. In such cases the policies are considered as making but one insurance. The insured may sue the underwriters on both policies; but he can only recover the real amount of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions. *Lucas* v. *The Jefferson Ins. Co.*, 6 Cowen, 635.

Re-insurance both on Marine and fire policies is a valid contract; and a corporation authorised "to make contracts of insurance against loss by fire of any houses or buildings whatsoever, and of any goods, chattels or personal estate whatsoever" was held to include the power to contract for re-insurance. *N. Y. Bowery F. Ins. Co.* v. *N. Y. Fire Ins. Co.*, 17 Wend. 359.

A contract of re-insurance is not prohibited by the principles of the common law. 2 Mass. 176; *New York Bowery F. Ins. Co.* v. *N. Y. F. Ins. Co.*, 17 Wend. 359.

A stipulation in the policy, that notice of any previous policy shall be given, means previous insurances by the party *insuring*. *Tyler* v. *Ætna F. Ins. Co.*, 12 Wend. 507.

In a contract of re-insurance, the policy was in the common form except the word *re-insure* was substituted for *insure*; and the party insured was a corporation as was also the insurer, who agreed to *re-insure* the former company against loss or damage by fire to the amount of $3000 on the stock of dry goods and ready made clothing, the property of J. M., contained, &c. *Held*, that this like the first contract, was an insurance of the *goods* of *Mortimer* The persons insured in the two policies were different; but the subject itself was the same in both. *N. Y. Bowery F. Ins. Co.* v. *New York F. Ins. Co.*, 17 Wend. 359.

Preliminary proofs in cases of re-insurance require only on the part of the re-insured immediate notice to the defendants of all the proceedings of the *original insured*, including notice of the judgment (if any) which has been recovered on the original policy, and the fact that the plaintiff had paid the money; for this is in the words of the condition of the policy—"as particular an account of their loss and damage as the nature of the case would admit. ib. And the oath of the re-insured is not required; but the oath of the original insured, in such cases, was contemplated. ib. See preliminary proofs.

CHAPTER XIII.

OF THE RECOVERY BACK OF LOSSES IMPROPERLY PAID.

If, after a loss has been paid, the insurers discover that there was fraud in the original contract, or that there were circumstances attending the loss which, if known at the time the loss was claimed and paid, would have justified them in resisting the demand, they may, it appears, maintain an action for money had and received to their use, to recover back the sum improperly demanded and paid; but if at the time they paid the money, they knew, or might upon inquiry have been informed, of the grounds upon which they could have resisted the claim, they cannot afterwards recover it back, for this would open a door to infinite litigation. It seems too, as Mr. Sergeant Marshall conceives, (2 Marsh. 740; *Bilbie* v. *Lumley*, 2 East. 469) that if even after the insured has recovered the loss by *process of law*, the insurers receive intelligence of *fraud*; which they could not possibly have known whilst the suit was depending, they may, in that case, maintain an action to recover back the money. (Emerigon, chap. iv. s. 6.) If money be actually *paid*, it cannot be recovered back without proof of *fraud*; but a *promise* to pay, as by an adjustment, is not binding, unless founded on a previous liability. (Per Ld. Ellenborough, *Herbert* v. *Champion*, 1 Camp. 134.)

These observations are applicable to insurance against fire as well as to marine insurances.

For the recovery of Losses.—The revised statutes in Massachusetts provide (p. 322 s. 18.) that if any insurance company shall be under liability for losses to an amount equal to their capital stock, and the president or directors after knowing the same, shall make any new or further insurance, the estates of all, who shall make such insurance, or assent thereto, shall be jointly and severally liable for the amount of any loss, which shall take place under such insurance.

The General law of Massachusetts in regard to Mutual insurance companies provides (R. S. s. 32.,) that when goods sufficient cannot be found, to satisfy any execution issued against them, upon a judgment recovered on any policy made by them, and the said corporation have goods or estate to satisfy such execution, and the directors shall neglect or refuse to pay the same, or if the directors shall, for thirty days after judgment recovered refuse or neglect to make such an assessment as they may be authorised to make therefor, and to deliver the same to the treasurer for collection, or if they shall neglect or refuse to apply such assessment, when collected, towards satisfying such execution; then and in either of the cases aforesaid, the directors shall be personally liable for the whole amount of the execution. See same stat. for further provisions.

PART II.

INSURANCE UPON INLAND WATERS.

A policy on rivers and inland waters is properly a Marine policy. By Story, J. 11 Pet. 213. And the doctrine of Marine Insurance has been held to apply to Steamboats on Rivers. ib.

Insurances of this nature, are governed in general by the principles applicable to both Marine and Fire Insurance. Consequently the cases already cited as applicable to the latter, will in general apply to insurance upon Inland Waters.

1. *Of the persons insured.*

It has been adopted as a general rule, that no insurance can be effected on the behalf of an alien enemy. And when an individual resides and carries on trade in an enemy's country, he is considered as for all civil purposes as adhering to an enemy. The doctrine applies equally to an American and to a neutral. If, however, the residence of an American is by compulsion, it is different. Some evidence therefore seems to be necessary as to the purposes of the residence or the place of the birth. See Hughes 1 *et seq.*

If a person has an interest at risk, he has a right to indemnify himself against loss by causing himself to be insured. 3 Mass. 137. The charterer of a vessel who has not made advances cannot insure the freight of the vessel *eo nomine;* for he has no interest at risk. 1 Hall, 452.

The owner of the vessel has the insurable interest in the freight and not the charterer, who is to pay it. 1 Hall, 325. But the better opinion seems to be that the charterer may insure in general terms under the name of freight the advances he makes the ship-owner. The actual proof of the advance cannot be dispensed with as proof in chief on the trial. ib.

Where the policy is effected for whom it may concern, and an action is brought in the name of the nominal party, it seems that one part owner may revoke the plaintiff's authority without affecting the right of the plaintiff to proceed in the suit for the owners. *Copeland* v. *Mercantile Ins. Co.*, 6 Pick. 198.

The agents of a steamboat effected an insurance for whomsoever it might concern: *Held,* that a mortgagee had a right to his mortgagor's portion of the money, to be applied in payment of the mortgage. *Rogers* v. *The Traders Ins. Co.*, 6 Paige, 583. In Chancery, the assignee of a chose in action must sue in his own name where the real party in interest. Where A. & B. were insured by name, and the words *or whom it may concern* added, with a clause

in the policy, that A. & B. might recover the whole amount insured: Held, that they were entitled to recover, although they were in truth owners of but a moiety of the building insured. *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72.

If the assured has an insurable interest, he may insure it without having his precise interest specified in the policy, 1 Caines, 276; 2 ib. 203; 11 J. R. 313.

Where the policy contains no words importing an interest in any other than the person effecting it, he only can recover on the policy. 5 Wend. 541; 8 ib. 144 S. C. But if a blank is left in the policy for the name of the insured, it seems that the holder of the policy may insert the name of the person intended to be insured. ib.

Where the interest of the insured is not absolute, but conditional; and arises from a lien for advances on goods "in trust or on commission," his interest is not covered by a mere insurance upon his property; they must be specified as goods held in trust or on commission;—especially where the condition annexed to the policy declares, that goods so held shall not be covered, unless they are insured 'as *such*. *Brichta* v. *N. Y. Lafayette Ins. Co.*, 2 Hall, 373.

One tenant in common, has no right, merely in virtue of such relation to cause insurance to be made on property on board of a vessel for his cotenant. Nor has a master of a vessel a right merely as master to procure insurance for the owners. 11 Pick. 85—1 Conn. 571.

A lender on bottomry may insure; and so may a consignee of the cargo, or an assignee, or indeed any one having an insurable interest. 6 Cowen, 318.

Consent given to what has been done is valid against a third person. 8 Wend. 152. But where a part owner effects an insurance in blank and the whole amount is paid to the party effecting the insurance: Held, that the other part owner cannot repudiate the contract in part and affirm another part; he must affirm the whole and bear the loss as well as gain. ib.

2. *Of the property insured.*

A *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured. By Parker, C. J. 13 Mass. 61. So several persons having several interests in property, may insure to the full value of that interest. ib.

The owner may insure his ship, the freight, his goods, and the profits expected to arise from them, or any of those subjects at his election, and the rights, which attach from the insurance of one, shall not be lessened or varied, in consequence of causing insurance to be made, or not to be made upon the other. 15 Mass. 341. The charterer of a ship has no interest as such, and he cannot therefore insure it *eo nomine*. Neither can he insure for advances on freight beyond the amount of the advance. 1 Hall, 325.

Though there is a mistake in the description, yet if it is not material to the risk, the mistake will not vitiate. 1 Wash. C. R. 145.

The owner of the cargo cannot repair the vessel on a voyage, and then cover his repairs by an insurance. 6 Cowen, 318. The ship is not bound to the cargo; for where the vessel is not pledged for the payment, there is no lien. 4 ib. 222; 5 ib. 66, S. P.

Profits are insurable. *Grant* v. *Parkinson*, Park, 267; 16 Pick. 397.

Strangers to the original contract cannot be introduced into the contract; the party must have an insurable interest and must also be the party for whom the insurance was intended. *Carroll* v. *Boston M. Ins. Co.*, 8 Mass. 515; *Pearson* v. *Lord*, 6 ib. 81.

3. *Of the voyage or trade insured.*

Voyage. The insured for a trading voyage is bound to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy. 2 Park, Ins. 468; 1 Marsh. Ins. 194; 3 Dougl. 39; 4 M. & P. 540; 6 Bing. 716.

The ship must proceed on her voyage to her destined port, in the shortest, safest, and most usual course; 3 J. R. 352; not deviating unless there be a necessity, 19 Mart. R. 126.

Where the insurance is to several places in succession, the vessel may proceed to any of the places named in the policy without beginning the series, and thence return to her port of discharge under the policy; for it would be of no benefit to either party to oblige her to go to more ports than the purposes of the voyage make necessary. 5 Pick. 89. If she is authorised to touch at a port, she may there take in or discharge her cargo, without its being considered a deviation, if there be no delay or change in the risk. 4 Pick. 471; 3 Wheat. 159; 2 J. R. 264; 3 Mass. 415; 6 Pick. 172.

Insurance from New York to Lynn, with leave to call at Newport, Held, that it was no deviation for the vessel to discharge at Newport, and put into another port from necessity, where she took in a deck load, there being no change in the voyage, or change in the risk. 5 Pick. 51.

A designed deviation will not vitiate, where the *termini* of the voyage described in the policy, and of the intended voyage remain the same. 1 J. C. 184; 2 Caines, 274; 3 Cranch, 384; 11 J. R. 241.

On time. An insurance on goods laden or to be laden on board during the term of *six calendar months*, without specifying any voyage in particular, was held to be the same as if a trading voyage had been in terms mentioned. 3 Wend. 283. And where the policy is on a trading voyage on time merely, without reference to any particular voyage or specified ports of lading or delivery, Held, that the insured may change the cargo as often as he pleases while the vessel is laying in a port where part of the cargo is disposed of in accordance with the general objects of a trading adventure; and although it might have been the intention of the master when he landed and sold a part of the cargo at a particular place, to have disposed of the whole there also, he had a perfect right, so long as a part of the cargo remained on board, to change his intention and go on with that part of the cargo to some other port.

Griswold v. *Amer. Ins. Co.*, 14 ib. 399. Even after the original cargo has been landed and sold, the master has a right to purchase the same goods and take them to some other port. The policy in such case, will attach upon the re-shipment. The policy attaches as a new risk, upon every change of the whole or any particular portion of the cargo on board, either in port or elsewhere. ib.

An insurance upon goods to be laden on board a vessel upon a trading voyage for 18 months, with liberty to the assured to extend it to two years, at the same rate of premium, without reference to any particular voyages, or any ports or places of lading or discharge, or any specific cargo upon which the risk was to attach for the whole 18 months or two years; was held to extend to the whole sum subscribed, if, after the landing of a portion of the cargo in safety at the first port where the vessel stops to trade, the residue of the cargo is totally lost by one of the perils insured against; and such residue of goods on board at the time of the loss shall amount in value to the sum specified in the policy. *Amer. Ins. Co.*, v. *Griswold*, 14 Wend. 399. A policy of insurance upon such a trading voyage, or upon time merely, where the vessel is to sail upon such a voyage, is in the nature of a new insurance upon the new cargo, or the goods remaining at risk, every time the cargo is increased or diminished otherwise than by the perils insured against. Thus, if the policy was underwritten for $20,000, and one half the first cargo was *lost* by the perils insured against, so that the underwriters had become liable to pay $10,000 on account of that loss, they would, upon the next change of the cargo, only be underwriters for the other half of their original subscription, and the shipper would be considered as his own insurer for the residue of such new cargo, for the purpose of apportioning a partial loss thereon between him and the underwriters. ib; *The Col. Ins. Co.*, v. *Catlett*, 12 *Wheat.* 333. In such an insurance, the policy attaches as a new risk, upon every change of the whole or any particular portion of the cargo on board, either in port or elsewhere. "Even after the original cargo had been landed and sold, (observes the Chancellor, in the case from Wendell) if the master had learned that it would probably be for the benefit of his owners to re-purchase the same goods and take them on to some other port, the policy would have attached upon those goods as soon as they were re-shipped."

But the total amount for which the underwriters are to be made liable during the whole time or voyage, except for general average or other expenses incurred for their benefit in preserving or attempting to recover the property insured, cannot exceed the amount of their subscription to the policy, upon which amount the premium of insurance is calculated. ib.

In the case of *Wood* v. *The Lincoln & Ken. Ins. Co.*, 6 Mass. R. 479; Parsons Comm. p. 360, S. C., Ch. J. Parsons observes:—"We observe that the policy in the case at bar was upon time; and that after the arrival of the vessel at Wiscasset, the policy had continuance for several months. If the plaintiff had afterwards employed her within the policy, and she had incurred a subsequent loss, total or partial, the defendants would have been holden to pay it, in addition to the partial loss, with which they are chargeable by the stranding in question."

Carriers on a canal effected an insurance for 12 months upon goods on board of 30 boats named, between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation. The insurance was agreed to be £12000 on goods, as interest might thereafter; the claim on the policy warranted not to exceed £100 per cent: and £3000 only were to be covered by the policy in any one boat on any one trip. The premium was 30 s. per cent:—

Held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject matter of insurance be rightly described the particular interest in it need not be specified:

Held also, that the policy was not exhausted when once the goods to the value of £12,000 had been carried by all the boats, or by each of them; but that it continued, throughout the year, to protect all the goods afloat at any one time, up to the amount insured:—

Held further, that upon the loss of goods on board of one of the boats, the assured was entitled to recover that proportion of such loss which £12,000 bore to the whole value of the goods afloat at the time; and not the proportion of £12,000 to the whole amount of the goods carried during the year. *Crowley* v. *Cohen*, 3 B. & Adol. 478.

Where the policy was "at and from Boston to all ports and places on the globe, and until return of the ship to Boston, not exceeding two years; and the vessel sailed from Brazil for Boston; but on arriving in the harbor, she was ordered by her owner to Salem for repairs—the two years not having expired:—in hauling her up for such repairs she was so much injured as not to be worth repairing:—Held, that there was no deviation in putting into Salem, and that the underwriters were liable; the vessel under the policy having a right to visit a port more than once. *Ellery* v. *The New England Ins. Co.*, 8 Pick. 14.

Insurance upon the hull of a steamboat, on time, will not cover expenses for the ordinary wages of the crew, while navigating the boat into a port to repair, after her founder. *Webb* v. *Protection Ins. Co.*, 6 Ohio R. 456. The underwriter is not liable for wages of the crew, between the place of founder and discharge, on the direct line of the voyage. ib.

4. *Form of a policy.*—A policy written in the old form, viz.—'as well in the plaintiff's own name, as for and in the name and names of all and every other person or persons to whom the same may appertain,' &c. is now not used in Massachusetts. By Jackson, J., in *Davis* v. *Boardman*, 12 Mass. 80. The policy stated that the plaintiff A. B., or as agent, made insurance, and it being agreed that the policy was for the benefit of the plaintiff and another joint owner, the plaintiff recovered the whole amount. ib. Such an insurance covers all the interest which the plaintiff and others or either has in the subject of insurance.

A general policy will cover the risk of fire at sea in a steamboat, as well as in any other vessel. *Pattison* v. *Mills*, 1 D. & C., 342; 2 Bligh. N. S. 509.

An insurance company authorized to make all kinds of insurance, may make re-insurance which operates not upon the risk, but upon the property covered by the original policy. *N. Y. Bowery F. Ins. Co.* v. *N. Y. Equitable F. Ins. Co.*, 17 Wend. 359.

5. *Of the Perils or Risks.*

The rule is, that the assurers are entitled to all premiums for assuming risks, for which they, by any possibility, be answerable. But where there could not be any possible loss incurred by the insurers, and the memorandum was made through innocent error, and without any fraud, and no risk was incurred, the premium shall be returned. 4 Mass. 56; 4 J. R. 443. See 17 J. R. 23.

Perils of the sea.—Losses by perils of the sea, are those which happen from the sea, and are necessarily incidental to a ship engaged in a sea voyage; such as those occasioned by the winds and waves; by lightning, storms, and tempest; by rocks, sands, and other natural causes. It is the proximate cause which must be regarded in considering whether a loss is to be ascribed to a particular peril or not. And a loss is properly ascribed to the perils of the sea, when they are the immediate and proximate cause of the loss, although another remote or intervening cause may have contributed to bring the ship into danger. As in the case of collision with or without fault; and although the captain has been guilty of gross misconduct, amounting to barratry, these are considered as losses by the perils of the sea. The insured are not accountable for the conduct of the crew, although there is an implied warranty on the part of the insured to provide a sufficient crew. See Hughes 163, et seq., (Am. ed.) *Shore* v. *Bentall*, 7 B. & C. 673.

The underwriters were held not liable, where the crew were insufficient, in not having a person on board able to take the captain's place on his being ill, and the ship was consequently obliged to deviate from her course to find a person to direct her. *Clifford* v. *Hunter*, 3 C. & P. 16. But this is a question of fact for the jury. ib. But the *negligent absence of the crew* at the time of the loss is no breach of the implied warranty that the ship should be properly manned. *Bush* v. *Royal Ex. Ass. Co.* 2 B. & A. 73; *Bishop* v. *Pentland*, 7 B. & C. 214.

The doctrine of marine insurance has been held to apply to steamboats on the Ohio. *Wallace* v. *Ohio Ins. Co.*, 4 Ham. Ohio Cond. R. 785. A policy on rivers and inland waters may properly be called a marine policy. Per Story, J. in 11 Pet. 213. In that case the insurance was effected on a steamboat on inland waters; and it appeared that the boat was lost by the explosion of gunpowder, which she had on board at the time, and which she had received to transport; and the loss was occasioned by the unskillful, negligent and careless stowing away of the same in the boat, by the officers and crew or some of them, so that the same took fire and become ignited, and the explosion thereby produced. Held, that the policy does not "cover a loss of the boat by a fire, caused by a barratry of the master and crew;" *id.* That the policy

does "cover a loss of the boat by fire, caused by the negligence, carelessness or unskillfulness of the master and crew of the boat, or any of them."

"For injuries to a cargo taken on freight, not occasioned by the perils of the sea, but by the defective state of the vessel, or the neglect or misconduct of the owners or mariners, the master and ship-owner are responsible to the freighters: and against these injuries they cannot insure, unless in some instances by a special clause in the policy. The responsibility of the master or ship-owner commences at the receipt of the goods; and at the same time the right to freight commences, which becomes then an insurable interest. Where the ship-owner is also the owner of the goods, and the freight is the expected increase of price, to arise by the carriage of them to a foreign market, the rules respecting the insurance of the cargo and the freight are the same. They are insurable against perils caused by the innavigability of the vessel, or the neglect or misconduct of the owner or his agents; but the goods become cargo as soon as they are received for the vessel, and with their freight, or the benefit of their carriage, become an interest insurable, under those names, against the perils of the sea, or those external misfortunes. which are not to be prevented by human foresight. While in port the cargo and *freight*, as well as the vessel, are exposed to perils of this kind; for instance, to capture, detention, or fire, which are not aggravated by a latent defect of the vessel, and respecting which the ship-owner is entirely innocent. In the case of a freighter sustaining a loss of this kind, and a subsequent discovery of a latent defect in the vessel, it would hardly be pretended, even if the insurer were discharged, that the ship-owner could be made responsible; the loss not being occasioned by the defect, for which he is chargeable, and the sailing in an innavigable state, being, at the time of the supposed loss, altogether future and contingent." Per Sewall, J. in *Taylor* v. *Lowell*, 3 Mass. 331—348.

The insurance in that case, was on the ship, cargo and freight, each distinctly valued, *at* and *to* a port of discharge. The ship sailed as represented, but she was leaky and returned and re-landed her cargo; and it appeared that the cause of her leaking existed when she took her cargo on board. She was repaired and performed her voyage in safety. The action was sued to recover back the premium; but it was held, that the insurance attached on the vessel, cargo and freight while in port; and also that the insurers were liable after her return and again while on her voyage. Sewall, J. in delivering the judgment of the court observed:—"Lord Kenyon says, from the nature of the thing every ship is, while in port, unavoidably undergoing repairs. The case of latent defects is not essentially different; for these may or may not be discovered before sailing." Again:—"That the circumstance, by which the breach is ascertained, to the effect of avoiding the policy, is the sailing of the vessel in an innavigable state. Until then there is an opportunity for the cure of latent defects, if they should be discovered; and their mere existence, while not prejuditial or material to the risk insured, is not a forfeiture of the contract."

The insurer was held liable for a loss occasioned through the negligence of

the persons employed to haul the vessel up to repair. 8 Pick. 14. But if the master of the vessel should misrepresent the vessel to those employed on the marine rail-way, and the loss consequently occur, the insurers would not be liable. ib. A loss occasioned by the negligence of the officers of a steam-boat, is not chargeable to the insurers, unless the policy contains an agreement to insure against barratry. *Howell* v. *Cincinnati Ins. Co.*, 7 Ohio, 276.

The New York policies usually contain a clause against barratry by the master or mariners, and also the warranty against loss by seizure on account of illicit trade or trade in articles contraband of war. It is settled, that the underwriters are not protected from liability for the loss occasioned by the fraudulent acts of the master and mariners, in clandestinely taking on board prohibited articles, on their own account, for the purpose of smuggling, contrary to law, and making a false manifest to protect such articles, by which the vessel and cargo are seized and forfeited. *American Ins. Co. of N. Y.* v. *Dunham*, 15 Wend. 9; *Suckley* v. *Delafield*, 2 Cai. Cas. 222.

It appears from the opinion of Ch. Justice Tilghman, in the case of *Smith* v. *The Delaware Ins. Co.*, 3 S. & R. 82, that this clause was introduced into the policies in this country about the year 1788, in consequence of disputes which had arisen between the underwriters and the assured, as to the liability of the former for losses which arose from seizures for breach of the revenue laws of a foreign country: the assured contending that unless those laws were known to them, the underwriters were liable. And this statement is not in conflict with the reported assertion of General Hamilton, *arguendo*, in *Bowne* v. *Shaw*, 1 Caines, R. 491. The question in the last case related to the warranty against loss *by trade in articles contraband of war;* which warranty does not appear to have been contained in the Pennsylvania policies, to which Ch. J. Tilghman alludes. After the decision of the supreme court in *Shaw* v. *Low*, 1 J. Cas. 1, it is very possible, that General Hamilton might have added the whole clause, as now found in the New York policies, adopting that part which relates to illicit trade, from the policies then in use in Philadelphia. The clause in question does not appear in the English policies.

The cases in Pennsylvania sustain the New York decisions. "It is understood that if a loss arises from illicit trade of the captain amounting to barratry, the insurers are liable." 2 Binney, 579–574. The Supreme Court of Errors in Connecticut also have decided, that a warranty of neutrality did not extend to a breach occasioned to a barratrous act of the master, where the policy contained the usual clause of insurance against barratry.

In *Dunham* v. *American Ins. Co.*, 15 Wend. 9, the policy insured against the *barratry of the master and mariners;* and it also contained a warranty by the assured in the following words:—"It is also agreed, that the property be warranted by the assured, free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war."

The exception in the policy: "It is also agreed that the assured shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade

in articles contraband of war. But the judgment of a foreign or colonieal court shall not be conclusive, upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the law of nations." The questien arose whether a seizure and detention to come within this exception must be for a legal and justifiable cause. The Court, Story, J. said, that the question ought to be answered in the affirmative. 8 Pet. R. 495. See 18 Martin's Lou. R. 11, 51.

A contract of insurance in violation of the law of the country, of the contract, is illegal. 15 Mass. 35; 14 ib. 121.

The import of restraint and detainment is the same. They are respectively the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained, and whenever she is detained she is under restraint. Per Parsons, C. J. in 6 Mass. R. 293.

Inception and duration of risk on freight.—The risk on freight does not attach until goods are either actually shipped on board, or until there is an actual contract for shipping them. *Flint* v. *Flemyng*, 1 B. & Adol. 45.

Where there is a valued policy on freight, and the ship is lost while taking in her cargo, the assured can only recover for the freight of the goods actually on board, unless a full cargo be then provided for her, or there be a contract either written or parol to supply one. *Patrick* v. *Eames*, 3 Camp. 441.

A homeward policy on freight, at and from Algoa, attaches, when the ship is at A. in a condition to begin to take in her homeward cargo. *Williamson* v. *Innes*, 8 Bing. 81; 1 M. & Rob. 88.

If the vessel is so disabled as to be unable to proceed on her voyage, the insured on freight may then abandon as for a total loss, except another vessel can be procured for less than half the freight. 7 Cowen, 584; 18 J. R. 210.

The charterer has no interest to protect by insurance; but he may insure his advances on freight. 1 Hall 325, 452. The particular interest of the charterer must be stated. 2 J. R. 346.

6. *Of Warranties.*—In the application for insurance, a steam saw-mill was described as 130 feet long and 30 broad, and it turned out that it was not only longer but broader. Held, that this was merely a representation, which did not affect the validity of the policy, unless it appear that the representation had the effect to lessen the premium of insurance. The court say that a warranty cannot be created by construction, but must appear on the face of the policy. The Jefferson Ins. Co., 7 Wend. 72. A representation to have the effect of a warranty, must be contained in the policy itself; and any instructions for insurance, unless inserted in the policy do not amount to a warranty. 2 Hall, 608; *Snyder* v. *Farmers' Ins. Co.*, 13 Wend. 94; *Dow* v. *Whetten*, 8 ib. 166. The policy is the only legal evidence of the contract of the parties.

7. *Of Misrepresentation and Concealment.*—It is the duty of the insured, in all cases, to disclose all material facts within their knowledge—and even upon the common doctrine of *concealment* in insurance cases, although no specific question be asked, the suppression of a material fact, although innocently done, will be in contemplation of law a fraud, snd vitiate the contract. Per Littledale, J. 4 Bing. 60. But what facts within the knowledge of the insured

are material to the risk, and necessary to be communicated to the assurers at the time of the application, is matter for the jury *exclusively* to determine, as was decided after the fullest consideration, and by the highest authority in New York. *New York F. Ins. Co.* v. *Walden*, 12 J. R. 513; *Tyler* v. *Ætna F. Ins. Co.*, 12 Wend. 507. See Ante, where the subject is more fully discussed.

8. *Of Loss.*—The character of a loss whether total or partial, is in general to be taken in connection with the circumstances of the disaster in determining whether it is one or the other. Thus, in case of a submersion *de facto*, the ultimate question is, can she be raised and repaired at a reasonable expense of time and money; and in case of stranding can she be got off and repaired at a reasonable expense. 11 Pick. 90.

Total Loss.—Whenever a total loss, in the legal contemplation of the phrase, has accrued, an abandonment or offer to abandon by the insured, gives a vested right to claim for such total loss, and throws the property upon the assurer. Per Parsons, C. J. in *Lee* v. *Boardman*, 3 Mass. 77. In such case, the master or whoever has charge of the property, becomes instantly upon abandonment, the agent of the assurer, and the earnings of the ship belong to him; and when the cargo is insured, the rise and fall of the market is at his hazard, and to his benefit:—the relation of the parties to the property is fixed by the act of abandonment. ib.

The right to abandon must depend on the facts known; he must have intelligence of the loss before he is admitted to his election of abandoning. 4 Mass. 38. When by stranding the voyage is defeated, the owner may abandon. See the observations of Chief J. Parsons, in the case of *Wood* v. *The Lin. & Ken. Ins. Co.*, 6 Mass. 479. See also 15 ib. 343; 13 ib. 102; 17 ib. 477.

In this country, it is well settled that where the vessel is damaged by any of the perils insured against, so that the expenses of repairing her would exceed *three fourths* of her former value, the owner may abandon and recover for a total loss:—this is an injury exceeding *half her value*, for the one third of the repairs is deducted, new for old. *Dickey* v. *American Ins. Co.*, 3 Wend. 658.

In Nickols v. *The Maine F. & M. Ins. Co.*, 11 Mass. 253, it was held, that the principle of deducting one third new for old, applies to a new ship; the rule is binding in all cases. And we have seen that this doctrine of Marine insurance applies to Steamboats on the Ohio river. Thus, in *Wallace* v. *The Ohio Ins. Co.*, 4 Ham. R. 785, where the boat was injured by concussion with another boat; and the repairs amounted to $1600; but by the terms of the policy the insurers were not to be responsible, unless the loss amounted to ten per cent. And they refused to pay on the ground, that the loss when reduced one third, upon the marine doctrine one third new for old, did not amount to $800; and the court upheld them in their position saying:—"We think that the doctrine of marine insurance applies to Steamboats on the Ohio. We understand that the rule is of universal application, and that it is not adapted to each particular case. It is so laid down by Judge Story, in *Peel et al* v. *The Merchants Ins. Co.*, 3 Mason, 73. We find it safer to adhere to doctrine as we find it settled, and administer it as an entire system. When the amount of one third is deducted from the whole charge for repairs, the loss is reduced to

a less sum than 800 dollars. This not being ten per cent. upon the actual value, the terms of the policy do not entitle the plaintiff to recover." In *Byrnes* v. *The National Ins. Co.*, 1 Cowen, 265, the rule was laid down to be this:—"to apply the old materials towards payment for the new, and to allow the deduction of one third new for old, upon the balance.

Partial Loss.—The company is not answerable for any partial loss on memorandum articles, except for general average, unless there is total loss of the whole of the particular species, whether the article be shipped in bulk or in separate packages or boxes. *Wadsworth* v. *Pacific Ins. Co.*, 4 Wend. 33. And where the memorandum specified that corn should be free from average unless general, it was held that the assurer was protected from every claim from a total loss where the destruction of the subject had not been an actual physical destruction. 1 J. C. 226.

In a policy of insurance upon the body of a steam boat upon time, the insurer is not chargeable with the wages of the crew while the boat is stranded within the time insured. *Gazzam* v. *Cincinnati Ins. Co.*, 6 Ham. Ohio R. 71; *Perry* v. *Ohio Ins. Co.*, 5 Ohio R. 306. The insurers are liable for the entire expense of repairing the injury, though only part of the repairs were effected at the first point after it occurred, and the remainder at another port. ib.; *Brooks* v. *The Oriental Ins. Co.*, 7 Pick. 268.

The running the boat while unseaworthy, after the injury complained of, does not avoid the policy. ib.

The assured have no right, in such case, to have the items of loss analyzed, to ascertain, if upon each separately, the amount is equal to that for which the assurers have become liable. ib.

9. *Of Average and Abandonment.*

(a) Of Average.—The word average means a contribution to a general loss. It is a contribution to which the owners of the ship, goods, and freight, become liable *inter se*, on the sacrifice of a part of the ship or cargo for the preservation of the whole, in a case of general danger. All the property which was saved from the peril and ultimately comes to the use of the proprietors, is liable to contribution in general average. 1 Hall, 430.

If the ship or any portion of the cargo be lost by a new accident, the owners of what was so lost cannot be made contributory in respect of it, to the indemnity of those who suffered by the sacrifice for the safety of those goods from the previous peril. By Jones, C. J. in ib.

It is a general principle which runs through all the cases, and has the sanction of all the courts, that the sacrifice made by the common agent of the whole or a part of the goods of some of the shippers, for the rescue of the whole interest from a peril which threatens the destruction of all, entitles the sufferers to contribution to the loss from those who benefit by the sacrifice thus made for the common welfare. And any private loss or damage which falls within that principle, and is purposely incurred for the general safety, is

entitled to the benefit of the rule of contribution wherever the parties called upon to contribute have profited by the sacrifice. ib.

So, where a ship having sprung a leak, a part of her cargo was taken out to lighten her, and to discover and stop the leak, which was put on board of another vessel, and lost by capture; but the leak in the first ship was repaired, and she enabled to proceed on her voyage, and finally reached her port of destination. The goods lost by the capture were contributed for in general average. ib. In *Magrath* v. *Church*, 1 Caines, 214, where in cutting away a mast, it made an opening which let the water into the hold, and damged the cargo, the damage was held a subject of average. But no obligation results from a loss or exposure which conduces to another's benefit, but was not designed or intended to subserve the general interest by averting a common danger. And although a benefit was intended to be conferred, but which has been disappointed by the result, a party shall not contribute. The case of *Whitteridge* v. *Norris*, 6 Mass. 125, turned upon the point that there was no intent to aid or benefit the ship or the residue of the cargo by the removal of the keg of dollars which was lost, from the ship into the boat.

Expenses incurred by the insured to preserve the property from fire in the near or adjacent building is the subject of general average, to which the insurer and insured are bound to contribute in proportion to their property at risk. *Welles* v. *Boston Ins. Co.*, 6 Pick. 182. The property immediately exposed can only be brought into contribution. ib.

There is no difference as it respects general average between an open and a valued policy. By Parker, C. J. in 2 Pick. 1.

A vessel accidentally stranded in the course of the voyage, and expense is incurred in exertions to finish the voyage, Held, that such expense is a subject of general average. 2 Pick. 1. So expenses incurred in recovering a vessel voluntarily run ashore to avoid impending danger. 9 J. R. 9. However, if by the act of running her ashore the ship is destroyed and totally lost, but the cargo saved, this is not a case of general average and the cargo is not bound to contribute. ib.

"Free from average unless general," are convertible with total loss; and under such a warranty by the insured, there must be a total physical destruction of the object insured, or a total destruction of the value. By Porter, J., 2 Miller's R. 432.

Average other than general includes every loss for which the underwriter is liable except total loss and general average. 4 Wend. 33. The meaning of the words *partial loss* is the same as *average*, and particular average comprises all partial losses except general average. ib. See 7 Pick. 259.

The terms "free from average unless general" are understood to be convertible with total loss; and under such a warranty by the insured, the law is perfectly settled in the United States, that there must be a total physical destruction of the object insured, or a total destruction of the value. Per Porter, J., 2 Miller's Lou. R. 432.

If a ship to avoid danger, be violently run ashore, and she is afterwards recovered and performs the voyage, the damages resulting from this sacrifice

are to be borne as general average. If in such case the ship is totally lost, but the cargo saved, this is not a case of general average, and the cargo is not bound to contribute. 9 J. R. 9. When the vessel is accidentally stranded, and by labor and expense is enabled to finish her voyage; the labor bestowed is in such case a subject of general average. 2 Pick. 1.

When during the course of a voyage on an inland canal, it became necessary to draw off the water; and the ship, in consequence, took the ground by accident on some piles which were not previously known to be there: Held, that this was not a stranding within the usual memorandum in the policy, the accident not having happened in the ordinary course of the voyage. *Rayner* v. *Goodmond*, 5 B. & A. 225.

A ship under conduct of a pilot in her course up the river to Liverpool, was against the advice of the master, fastened at the pier of the dock by a rope to the shore, and left there, and she took the ground, and when the tide left her fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged: Held, that this was a standing to entitle the assured to recover for an average loss upon the goods. 4 M. & S. 77.

So, a ship arrived in Hull harbor, which is a tide harbor, and proceeded to discharge her cargo at a quay on the side of it; this could be done at high water only, and could not be completed in one tide. At the first low tide the vessel grounded in the mud; on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbor, stretched, and the wind blowing from the east at the same time, she did not ground on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury to the vessel; Held, that this was a stranding within the meaning of the words "warranted free from average, unless general, or the ship should be stranded." *Wells* v. *Hopwood*, 3 B. & Ad. 20.

Although the captain may be wrong in attempting to enter a port without a pilot; yet the underwriters are liable; the captain being a person of competent skill, having used reasonable diligence to obtain a pilot, and having exercised his discretion *bona fide* under the circumstances. *Phillips* v. *Headlam*, 2 B. & Ad. 380.

"When a ship is stranded, the assured cannot for that cause merely, immediately abandon. See the observations of Parsons, C. J., in 6 Mass. R. 479.

A foreign adjustment of an average loss is conclusive upon the parties, because it is the duty of the master to cause the adjustment to be made, and to see to the settlement of the averages: and the assessments made upon the parties may be coerced by suit or by the detention of the goods. By Jones, C. J. in 1 Hall, 430; 11 J. R. 323. It being the duty of a master to cause an adjustment to be made on his arrival at the port of destination, he may enforce the payment of the contribution, and that he has lien upon the cargo for its proportion. ib. See 5 Cowen, 63.

Abandonment.—An abandonment must be explicit and yield up all the inter-

est of the assured. 5 Pet. 604. No particular form is necessary; neither is a writing indispensable.

The owner must abandon within a reasonable time after notice; but what is a reasonable time must depend on facts. When the facts are found, it is a question of law. 4 Mass. 668.

The right to abandon depends on the facts known. ib. 211. When the right is exercised, subsequent events cannot divest. 6 Mass. 479.

Where the vessel was stranded on some rocks, and overset and was filled with water; and in a day or two after, being disengaged from the rocks, she sunk in deep water, which covered her. An offer to abandon was made the day after the accident, but before she sunk in deep water. The offer not being accepted; and the insurers succeeding in recovering the vessel, carried her to the termination of the voyage, then repaired her, and offered her to the owner: Held, that the vessel had not been lost nor the voyage defeated. Accordingly, the court appointed commissioners to adjust the partial loss.

"The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture: where there is a moral restraint and detention which deprives the owner of the free use of the ship, as in the case of embargoes, blockades, and arrests by sovereign authority: where there is a present total loss of the phyisical possession and use of the ship, as in case of submersion: where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port where the disaster happens: and lastly, where the injury is so extensive that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value. None of these cases will be disputed. If there be any general principle that pervades and governs them, it seems to be this; that the right to abandon exists whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility. By Story, J., in *Peele* v. *Merch. Ins., Co.* 3 Mass. R. 65.

A constructive total loss of the subject insured, will authorise an abandonment. *Coolidge* v. *Gloucester Marine Ins. Co.*, 15 Mass. 343. And it seems, that an abandonment of the freight may be made after that of the ship. ib. But the freight earned before the loss belongs to the insurer on freight where an abandonment is made of the ship; but it would be different if the owner has not insured the freight. ib.

In *Higginson* v. *Dall*, 13 ib. 96, it was held, that an abandonment was of no avail unless the assured had the power to transfer the subject of insurance:—and therefore after an abandonment to one set of underwriters, an offer to abandon to another set was a nullity; although the loss was constructively total he could recover only a partial loss.

The *master* of a vessel has power to convert a *total* into a *partial* loss before abandonment. Thus, where the vessel was damaged on the voyage; but the master caused her to be repaired, so that she was again on the voyage before the abandonment:—Held, that as the voyage was not lost, and the vessel arrived in safety, the assured could not abandon; but could only recover for a partial loss:—although it appeared that the owners on receiving advice of the damage, forthwith abandoned the vessel to the insurers. *Dickey* v. *American Ins. Co.*, 3 Wend. 658. However, in that case the abandonment was in fact made after the vessel had been repaired and sailed on her voyage; had the abandonment been made while the loss continued total, the acts of the master would have been deemed to be the acts of the insurers. ib.

Formerly, it was held, that the right to abandon was to be decided by the information of the assured at the time of the abandonment; and was not to be affected by the actual state of the property when the offer to abandon was made. *Mumford* v. *Church*, 1 J. Cas. 147. This doctrine, however, has been overruled. See Greenl. Cas. overruled and the cases there cited. (No. 1688.) See also No. 139, particularly the observations of Judge Story there cited from 3 Mason, 27:—"With us an abandonment once rightfully made, is conclusive between the parties, and the rights flowing from it are not divested by any subsequent events, which change the situation of the property, and make that, which was a total loss, at the time of abandonment, a partial loss only. And the right of abandonment is to be decided by the actual state of facts at the time of the abandonment, and not merely by the information of the assured; and consequently, if the facts do then warrant it, no prior or subsequent events will give it any greater efficacy.

But if a vessel is stranded, the underwriter is not obliged to accept the offer to abandon; but may take her into his possession and repair her, the assured refusing to do it, and if he can do this at an expense less than half her value, he may restore her to the assured, and thus avoid paying for a total loss. *Peel* v. *Suffolk Ins. Co.*, 7 Pick. 254. But see Greenleaf's Cas. overruled, p. 277. (No. 1811.)

It is settled in England, that the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon is made. *Bainbridge* v. *Neilson*, 10 East, 329; 1 Campb. 237; 9 B & C. 718. But if the insurer accept the offer of abandonment, made upon a temporary total loss, they are bound by it.

"I take the legal principle to be, that if by any of the perils within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment." Per Bayley, *J.* 1 C. & P. 215; 2 B. & C. 697. But this doctrine is overruled in *Roux* v. *Salvador*, 1 Bing. N. C. 526.

If a vessel is so disabled that she cannot be repaired, there is no necessity, of any abandonment. *Gordon* v. *Massachusetts Fire & M. Ins. Co.*, 2 Pick. 249. Indeed the insured may always recover the actual loss without abandonment; the distinction is between an actual and total loss, in the latter case only is he obliged to abandon. ib.

Consequences of Abandonment. It is settled in England, that the underwriters, after an abandonment, are entitled to the whole freight of the voyage then in the course of being earned, as incident to the ownership of the ship, without distinction between the portion of the freight, whether earned as a *pro rata* freight antecedent to the abandonment, or that earned afterwards. *Case* v. *Davidson*, 5. M. & S. 79; 2 Bro. & B. 379, S. C.; 8 Price, 559. But this is opposed to the case of *Hammond* v. *The Essex F. Ins. Co.*, 4 Mason, 196, 201, and cases cited. See Greenl. Cas. over. No. 448.

When an abandonment is made by the assured, it is not necessary to produce evidence of the loss under oath. The capture took place on the 25th of April, 1806, and on the first of May following, one of the owners wrote the plaintiff an account of the loss, and stated that the intelligence was received by one of the pilots, who was on board the ship, and had been turned out by the captor. On the 5th May he again writes, directing the plaintiff in consequence of the capture he had mentioned in his last, to abandon the ship and cargo for him and his partner. And on the 8th May, plaintiff communicates these letters to the office, and makes the abandonment according to the directions:—Held, that the evidence of the loss exhibited was sufficient. *Munson* v. *The New. Eng. Ins. Co.*, 4 Mass. 88. Nothing can be objected against the evidence, but the want of the affidavit of the pilot, which it is not usual to send, and which he is not obliged by law to make. The master was a prisoner and could make no protest, which is the usual evidence, when it can be obtained.

Abandonment test of.—The sum agreed upon in the policy is at least presumptive evidence to determine the right to abandon. *Winn* v. *The Columbian Ins. Co.*, 12 Pick. 279.

The information which is sufficient to authorise the assured to give notice to the underwriter, that he abandons, must be of such facts and circumstances, as would sustain the abandonment, if existing in point of fact, at the time the notice was given. 3 G. & John. 450; 4 Pick. 439.

Where the policy contained this clause, viz:—"It is also agreed that in case of a capture or detention, the assured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention (by capture or other arrest,) for at least 90 days: *Held*, that the effect of this clause was to postpone the right of abandonment for the term named, of ninety days. But the kind or degree of proof requisite to be furnished, is not such as would be requisite to sustain an action, but such as is usually produced to underwriters as preliminary proof of loss. Per Shaw, C. J. in 12 Pick. 348. See also 12 Wheat. R. 391.

10. *Proceedings on Policies.*—This subject has been fully discussed under the subject of Fire Policies. The underwriters are entitled to have it stated on the record, whose interest the policy was intended to protect, although the action be brought in the name of the person who effected the policy, and although he be not himself interested. *Rider* v. *Ocean Ins. Co.*, 20 Pick. 259. See 4 Mass. 88; 5 Pick. 76.

The insured is entitled to recover the full amount to which he is entitled,

although in exhibiting his preliminary proof as to his loss, he states his demands less in amount than what he is legally entitled to recover. 14 Wend. 399.

The term "false swearing" as in the conditions of a policy, mean an attempt to defraud, by swearing intentionally, to the existence of property which the insured never lost, or by greatly overcharging that which was destroyed, or not acknowledging that any was saved. By Jones, C. J. 2 Hall, 490.

In *Whitney* v. *The N. Y. F. Ins. Co.*, 18 J. R. 208, the Court say—"To sustain an action on a policy for freight the plaintiff must prove, that the ship was disabled by the perils insured against, and that the cargo could not have been carried from the port of necessity to the port of destination, for one half the freight valued in the policy. The rule is now perfectly established, that a policy on freight does not insure the soundness of the goods, but merely their safe carriage to the port of destination. It is immaterial to the insurers whether the cargo arrive in good, or in bad condition, provided the goods specifically remain. If they perish from internal causes of decay, or are spoiled by reason of the perils of the sea; still if they are carried to the port of destination, and are ready to be delivered there, or if the master is able and offers to carry them, but the owner of the goods voluntarily elects to receive them at an intermediate place, the ship owner is entitled to his full freight, although the goods are of no value to the shipper.

Insurance upon goods *outward* and upon their *proceeds home*, does not cover the *same* goods on the return voyage. *Dow* v. *The Hope Ins. Co.*, 1 Hall 166.

In *Havens* v. *Gray*, 12 Mass. 71, there was a valued policy of Insurance on cotton, from Portsmouth (New Hampshire,) to a port in Europe; the risk so attached to the *proceeds* of the articles insured, in the return cargo. The outward cargo was not sold, on its arrival at the port of destination, but was consigned to merchants at St. Petersburgh, for sale; who, in *consideration of the consignment*, advanced to the plaintiffs a return cargo, which was laden on board the ship, for the account and risk of the plaintiffs. The ship and cargo were lost on the return voyage to the United States, before any part of the outward cargo was actually sold.

The question was, whether the return cargo could be considered as the *proceeds* of the outward cargo, within the terms of the policy. The court held, that it ought to be so considered. C. J. Parker, says, "In a liberal sense "the return cargo was the proceeds of the outward cargo: for without the "latter, the former would not probably have been procured. The consign- "ment to the house at St. Petersburgh must be viewed as a deposit of the car- "go with liberty to sell and reimburse themselves for the money advanced on "the credit of the deposit." And he held the meaning of the clause in the policy to be, that the underwriter took the risk home, of any property which *might be substituted for that which was carried out.* In *Whitney* v. *The American Insurance Company*, 3 Cow. 210, there was an insurance on a quantity of wine out, and *returns* home. At the port of destination the wine was *deposited for sale*, and an advance made on such deposit with which the *return* cargo was procured. The court held, that this was equivalent to an actual sale of the wine, and a purchase of the homeward cargo, with the money arising from

the sale; and that the policy therefore covered the homeward, as well as the *returns* of the outward cargo.

These cases establish the doctrine that where the insurance is on the *proceeds* or *returns* of an outward cargo, the words must receive a liberal construction: and that it is not necessary that the return cargo should be procured by an actual sale of the outward cargo, and an appropriation of the money arising from such sale. It is sufficient that the homeward cargo should be a substitute for the outward, and should spring, though indirectly, from the disposal of the latter, either by sale or deposit; or that it should be procured on the credit, or in consequence of the outward cargo. But while these cases look to a liberal construction of these words in the policy, they do not lose sight of the necessity of adhering to the evident intent of the parties, and do not mean to intimate that any violence is to be done to the plain letter of the contract. They adhere to the spirit and terms of that contract, when they recognize the principle, that there must be an actual change of the outward cargo, and the substitution of a new cargo for it.

The Massachusetts Insolvent law of 23d April 1838, provides (s. 3.) that— "All debts due and payable from such debtor, at the time of the first publication of the notice of issuing the said warrant, may be proved and allowed against his estate assigned as aforesaid; and all debts then absolutely due, although not payable until afterwards, may be proved and allowed as if payable presently, with a discount or rebate of interest, when no interest is payable by the contract, until the time when the debt would become payable; and all moneys due from such debtor on any bottomry or respondentia bond, or on any policy of insurance, may be proved and allowed, in case the contingency or loss should happen before the making of the first dividend, in like manner as if the same had happened before the said first publication of the said notice; and in case the debtor shall be liable for any debt, in consequence of having made or indorsed any bill of exchange or promissory note before the first publication of the said notice, or in consequence of the payment by any party to any bill or note, of the whole or any part of the money secured thereby, or of the payment of any sum by any surety of the debtor in any contract whatsoever, although such payment in either case shall be made after the said first publication, provided it be made before the making of the first dividend, such debt shall be considered, for all the purposes of this act, as contracted at the time when such bill or note or other contract shall have been so made or indorsed, and may be proved and allowed as if the said debt had been due and payable by the said debtor before the said first publication; and all demands against the debtor, for or on account of any goods or chattels wrongfully obtained, taken, or withheld by him, may be proved and allowed as debts, to the amount of the worth of the property thus taken; and no debt other than those above mentioned shall be proved or allowed against the estate assigned as aforesaid. And when it shall appear that there has been mutual credit given by the debtor and any other person, or mutual debts between them, the account between them shall be stated, and one debt shall be set off against the other, and the balance of such account and no more shall be allowed or paid on either side respectively."

We have seen, p. 59, that the policies in the U. States, are framed after the model of those in England; they generally acknowledge the receipt of the premium, although we have no statute like the British requiring such a clause to be inserted, and drawing after it the consequences that the acknowledgment in the policy stands in the place of the payment of the money, and is conclusive evidence of that fact. *Flint* v. *The Ohio Ins. Co.*, 8 Ham. R. 501.

It has been shown, p. 89 *et seq.* what misrepresentations will vitiate; it may be observed, that a fraudulent misrepresentation made for the purpose of procuring the policy, may be shown by the defendants. But mere statements as to the manner in which the insured expected to load his vessel, is inadmissible. The insured is not confined to a particular cargo or to a particular voyage unless it is so stipulated in the policy.

The case of *Stebbins* v. *The Globe Ins. Co.*, cited p. 78 and 96, decides that alterations of the premises insured, subsequent to the policy, by the erection of buildings contiguous to the insured, is immaterial, unless the insurers can show that they have been injured by such erection. But *it seems* the decision in that case would be inapplicable in cases where the terms of the policies are different. For instance, if the policy is made in pursuance of the Company's act of incorporation, which provides, "that if any alteration should be made in any house or building, by the proprietor thereof, after insurance has been made thereon, with said company, whereby it may be exposed to greater risk or hazard, from fire, than it was at the time it was insured, in every such case, the insurance made upon such house or building, shall be void, unless an additional premium and deposit, after such alteration, be settled with, and paid to the directors; but no such alterations or repairs, in buildings, not increasing such risk or hazard, shall in any wise affect the insurance previously made thereon." In such a case, an alteration by the tenant of the plaintiff in such a manner as to increase the risk or hazard, would doubtless avoid the policy, especially if made with the knowledge or permission of the plaintiff.

The underwriter has an undoubted right to be informed of every circumstance tending to enhance the risk, against which insurance is sought, and which, if disclosed, might induce the insurer to decline or demand a higher premium. *Walden* v. *Lou. Ins. Co.*, 12 Lou. R. 134. Thus, where the plaintiff was induced by the rumor of an attempt to set fire to an adjacent rope walk, to insure his house against fire, and withheld this circumstance from the underwriters, it was held that he could not recover. ib.

Where there is nothing in the policy which renders the insurers liable for the acts of the captain or officers of steamboats, their liability for their conduct must depend on the law. *Herman, Briggs & Co.* v. *Western M. & F. Ins. Co.*, 13 Lou. R. 516.

The business of towing vessels is entirely separate and distinct from all things connected with or incidental to the navigation of the river by steamboats, or the transportation of freight and passengers. ib.

The testimony of the officers of steamboats, that it is usual to take vessels in tow in their voyage up and down the river, cannot have the effect against

the insurers, when there is no evidence as to the *usage* of insurance in such cases, or whether such a privilege is or is not stipulated in the policies. ib.

A loss occasioned by the negligence of the officers of a steamboat, is not chargable to the underwriters, unless the policy contains an agreement to insure against barratry. *Flint* v. *The Ohio Ins. Co.*, 8 Ham. R. 501; see ante p. 39 *et seq.*, and p. 146. But see the observations of Story, J. ante p. 37 to p. 40.

Lord Denman, C. J., (7 Ad. & El. 40.) says—"I own I feel a doubt, whether, if it were distinctly averred, that the ship had by gross negligence been brought, during the voyage, to a condition in which she would not be insurable, that might not be a defence. It is certainly a new, and perhaps a dangerous one; but I think that, if it were clearly made out, the assured could not say that the loss was by perils insured against.

If the policy be on a house which is rented to a tenant, and it be destroyed by fire, Mr. Bell considers it to be a difficult and unsettled question, whether the policy would cover the rent lost as being part of the owner's loss, when the policy was silent as to rent *eo nomine*. See 1 Bell Com. on the Laws of Scotland, 627. The better opinion clearly is, that such a loss could not be recovered; the value of the building only can be recovered by the insured. See 3 K. C. 372.

On policies against fire generally, losses by the negligence of tenants are within the risks taken. And it is still more clear, that losses by the negligence of tenants, or by the criminal wantonness, or misconduct of mere trespassers, or intruders, or felons are within the common policies against fire. By Story, J. in *Catlin* v. *Springfield F. Ins. Co.*, 1 Sumner, 434; see ante p. 40.

Where the claim for indemnity against loss by fire, is resisted by a charge of an attempt by the claimant to defraud the underwriters in setting fire to his own store, and claiming losses on goods which never happened; such fraudulent *intent must be shown*; but it may appear by presumptive as well as direct evidence; and when once established, no recovery can be had. *Regnier* v. *Lou. State M. & F. Ins. Co.* 12 Lou. R. 336.

So, where the statement of losses sworn to by the claimant is disproved by witnesses, he is precluded on that ground from a recovery against the underwriters. ib.

Presumptive and circumstantial evidence in a case may be insufficient to convict in a criminal prosecution for arson, and yet strong enough to prevent a recovery on a policy of insurance, when the claimant is charged with attempting to defraud the underwriters. ib.

Under the averments that the goods to the amount mentioned in the policy of insurance, were not lost, and that the insurer suspected and had reason to suspect, that the pretended loss was altogether fraudulent, evidence will be received to prove that the plaintiff had *not* the goods when the loss occurred. *Brugnot* v. *Lou. State M. & F. Ins. Co.*, 12 Lou. R. 326.

A late case in the District Court in Pennsylvania decides, that a levy by the sheriff upon goods covered by insurance, will not vitiate the policy; for the underwriters must be presumed to have contemplated such an event as an incident of the property insured. Should, however, the conduct of the sheriff

be so plainly unusual and irregular, as to increase the risk beyond the ordinary effect of a levy, the underwriter *it seems* can make it a matter of defence.

A case of considerable practical importance has been recently decided before Mr. Justice Jones of the Superior Court of the City of New York. The action was brought to recover for a loss to a cargo of grain. It was shown to be the custom of the trade to separate the sound bags from the unsound; and in offering the damaged bags for sale, it was usual to leave one end of each bag open for inspection. The learned Judge held, that the assured was bound to separate the sound from the unsound; for the latter only could be sold on account of the underwriter. He also held, that the underwriters were only liable for damage arising from the immediate perils of the sea. It was for the Jury to say how much of the damage arose from that cause, and if it amounted to an average, then plaintiffs were entitled to recover to that extent, and no more.

Where the policy mentions that the company "shall within 30 days after certain proofs made, furnish the insured with a like quantity of any or all of the said goods, and of the same quality, or make good the damage or loss by paying therefor;" Held, that the rule of damage was such a sum as would make good the loss sustained. Prospective profits are not to be taken into the account; but only a sum sufficient to enable the insured to replace his stock of goods.

Loss by fire is generally not total, the valuation in the policy is not conclusive as to the real value; it is rather fixing the maximum. In France valued policies against fire are rejected. And in *Wallace* v. *Insurance Co.* 4 Miller's Lou. R. 289, the legality of a valued policy against fire seems to be questioned. The policy is clearly open, unless otherwise expressed. 1 Hall, 41; 1 Green's R. 100.

Where a policy against fire covers $15,000 of the property insured; and a second policy is taken out of another office on the same property as a valued one, which is endorsed on the first policy, it cannot have the effect of putting the first office in *duviori casu*, or to convert its policy from an open to a valued one. *Millandon* v. *Western M. & F. Ins. Co.*, 9 Lou. R. 27.

2. If a subsequent policy contain no provision in respect to prior insurances, the amount of insured's interest in it will be the same as for the first policy; for the insurer may insure again and again the same property, but can recover but one indemnity, and this he may recover of the first or subsequent underwriters. Those who pay the loss, may demand a proportionable contribution from the other underwriters, who are in this respect sureties for each other. ib.

3. Insurance on merchandize, furniture or buildings against fire, is governed by the same rules as to valuation, as a ship or cargo. If the policy is open in its form, the value of the interest must be proved. ib.

The *inception* of the risk on freight has been adverted to on p. 147. The insured under an insurance upon freight may recover the profits expected to be made by carrying their own goods in their own ship, upon the voyage insured.

Where the assured had purchased a cargo with the intention of freighting the vessel upon the voyage named in the policy, which was procured before the repairs of the vessel were completed, and deposited in a ware house seven miles from the dock where the ship lay, ready to be put on board;—Held, that the interest of the assured in the subject matter had attached, so as to entitle him to compensation for the loss of freight.

Where the vessel was placed in a dry dock, for the purpose of repair, and whilst in the act of being taken out, according to the mode and usage of the place, she was so much injured as to make it necessary to have her broken up:—Held, that such loss came within the words in the policy, "all other perils, losses, and misfortunes that had or should come, to the hurt, detriment, or damage of the subject matter of the insurance." *Devaux* v. *J. Anson*, Common Pleas, 1839. All that seems necessary with respect to the cargo being, that it must have become the property of the party insured, by a contract made with a view to its being sent on board, and actually in a state of readiness, (reference being had to the nature and description of the voyage insured,) to be put on board, when the ship arrives at the place of deposit.

All the authorities upon the subject go to show that the intention of the party effecting the insurance, at the time of doing so, ought to lead and govern the future use of it; and that no one can by any subsequent act, entitle himself to the benefit of it without showing that his interest was intended to be embraced by it when it was made. And when the policy is under seal covenant can only be maintained in the name of a party to, or the covenantee, named in the deed, or his legal representative. *De Bolle* v. *Penn. Ins. Co.*, 4 Whar. R. 68.

Where a policy was executed by an incorporate insurance company, under their seal, for one year; and the policy contained a clause that persons desirous of continuing their insurance, might do so by a timely payment of the premium, without being subject to any charge for the policy; and the insurance was continued from year to year by indorsements on the policy, which were not under seal:—Held, that these indorsements did not continue the instrument as a specialty; and therefore that the action of covenant would not lie to recover for a loss incurred after the expiration of the first term. 2 Whar. R. 167.

In the late case of *Lounsbury* v. *Protection Ins. Co.*, 8 Conn. R. 459, the following judgment was given. (For Form of the Declaration, see App. of Forms.)

Daggett, J. 1. "It is contended by the counsel for the defendants, that the declaration is insufficient. It states, generally, that the defendants, being an incorporated company, for a certain premium, by their policy, made insurance on the buildings, &c. of the plaintiff, viz. a building occupied by the plaintiff as a manufactory of hat bodies, and on the privilege for all the process of said business. There were many conditions annexed to the policy, which the declaration recites, with an unnecessary particularity, and then alleges a loss by fire, and that the plaintiff made proof of loss according to the requirements of the policy. One of those conditions, as they are called, is, that the

insurers 'will not be liable for any loss or damage, which may happen or take place, by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power.' Another is, that if the building shall be used, during the year for which it is insured, for any occupation deemed in the policy hazardous or extra-hazardous, such as soap-boiler's or tallow-chandler's business, &c. unless otherwise in the policy specially provided for, then so long as it may be thus occupied, the policy shall cease and have no effect. Now, it is said, that the declaration is insufficient, because those exceptions are not negatived. I feel no difficulty on this point. All these conditions, if such they may be called, are inserted in the policy by way of proviso, and not at all as conditions precedent. They are introduced for the benefit of the defendants; and they must be taken advantage of, if at all, by pleading. This general rule of law cannot be controverted. Com. Dig. tit. Pleader. C. 81. *Hotham* v. *The East India Company*, 1 Term Rep. 638. 645, 6. 1 Chitt. Plead 228, 9.

"There is another condition, also, which, upon the same principle, ought to have been noticed in the declaration, and the exception negatived. It is expressly provided, that if there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. It is believed, that an averment, that the plaintiff had practised no fraud nor swore falsely, would sound rather oddly in the ears of a good special pleader.

"2. The other exception to the declaration is, that there is no averment, that the justice of the peace, Benjamin Isaacs, Esq., before whom the plaintiff made oath to the amount of the loss of property, was not concerned in the loss, nor related to the party; and therefore, for aught that appears, he was incompetent to take this affidavit. In reply to this objection, it may be observed, as was said to a precisely similar objection in *Booth* v. *Booth*, 7 Conn. Rep. 366. 'Who ever supposed before, that such an allegation was necessary? It is never necessary, in pleading, to negative the exception, which may exist against a judge or justice.' The declaration, then, is good, even upon demurrer; and therefore, it becomes unnecessary to consider another ground taken by the plaintiff, to wit, that if it were defective, it is cured by verdict.

"3. There is an exception on the motion for a new trial, that the declaration on oath of the loss of property, did not comport with the allegation in the declaration, nor with the 10th condition annexed to the policy; and therefore, was inadmissible. By this 10th condition, in case of loss, the insured is bound to declare on oath, 'whether any, and what other insurance has been made on the same property.' The certificate of the declaration of the loss, made by the plaintiff, so far as regards this point, is in these words: 'That said property, or any part thereof, was not, nor has been insured, since the policy of insurance was taken out from the Protection Insurance Company.' The allegation in the declaration is, that this declaration was: 'That no other insurance had been made on the property destroyed as aforesaid.' The objection is, that by the declaration, a prior insurance might have been made. Now, I read so as to exclude that idea, without doing any violence to the language. It is as plain as though it had been expressly said, the property was

not insured, when this policy was made, nor has it been since, except by this policy. The objection is indeed hypercritical.

"4. The charge, it is said, was incorrect, because by the terms of the policy, taken in connexion with the conditions, no carpenter's shop could be kept in the building insured, for any purpose. The insurance was on the building for the manufacture of hat bodies and on the privilege for all the process of said business. These words are very comprehensive. They must include a license or authority to do whatever was necessary to the manufacture of hat bodies. All necessary machinery might, of course, be made there. It might, also, be there repaired. It would be a very narrow construction, that when a cog in a wheel was needed, or when any part of the machinery required repairing, it could not be done within this building, but the plaintiff must be delayed by going elsewhere. 'Carpenters in their own shops, or in buildings erecting or repairing,' are not protected, but excluded. This work seems to me fairly with the privilege 'for all the process of manufacturing hat bodies,' as expressed in the policy.

"It is further urged, that it having been admitted, that this building was occupied, during the existence of the risk, for a carpenter's shop, within the prohibition in the policy, the policy was vacated, and could not be revived, but by some new act of the parties. This objection is refuted, by an express provision in the contract of insurance; and assuredly, the parties must be left to contract of themselves. It is the duty of the court to expound and enforce, not to make, contracts. If the building shall be appropriated to any prohibited use, thenceforth and so long as the same shall be so appropriated, the policy shall cease to bind the insurers. It is difficult to find language more suited to repel this objection.

"Lastly, it is contended, by the defendants, that if the jury found the use of the building as a carpenter's shop, had ceased, yet if the boards and other lumber remained there, then the risk of fire was increased, and the court should have instructed the jury, that the plaintiff could not recover. In this part of the case, it is material to observe, that no lumber, or any other article supposed to have been in the building, when the carpenter's work had been carried on, was deemed either hazardous or extra-hazardous, or at all prohibited. There can, therefore, be no objection, on the ground of any such articles being in any part of the building.

"The declaration, then, is sufficient; and the motion for a new trial must be denied."

APPENDIX OF FORMS.

PART I.

MARINE INSURANCE.

Common Form of Policy of Insurance on Ships or Goods.
[Vide 35 Geo. 3. c. 63.]

In the name of God, Amen. A. B. as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doeth, may, or shall appertain, in part or in all, doth make assurance, and caused himself, and them, and every of them to be insured, lost, or not lost, at and from

upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the —— whereof is master, under God, for this present voyage, E. F., or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, &c.

and so shall continue and endure, during her abode there, upon the said ship, &c. And farther, until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandises whatsoever, shall be arrived at

upon the said ship, &c. until she hath moored at anchor twenty four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to and touch and stay at any ports and places whatsoever

without prejudice to this insurance, the said ship, &c. goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear, and to take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments of all kings,

princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ships, &c. or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandise and ships, &c. or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto for this assurance by the assured
at and after the rate of

In Witness whereof we the assurers have subscribed our names and sums assured in *London.*

N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average, under five founds per cent. And all other goods, also the ship and freight, are warranted free from average under five pounds per cent. unless general, or the ship be stranded.

The Policy of the London Assurance Company is superscribed with the words:
London Assurance House. No. No. In London.
By the Governor and Company of the *London Assurance.*
and in the clause of valuation the words are, "for so much as concerns the assured (by agreement between the assured and the London Assurance) are and shall be valued at ——— *l*, without further or other account to be given by the assured for the same. Touching, &c.

The conclusion after the words (or elsewhere in London in the last policy) is as follows:—And so the said London Assurance are contented, and do hereby promise and bind themselves and their successors to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this assurance by the assured, at and after the rate of per cent. In witness whereof the said London Assurance have caused their common seal to be hereunto affixed, and the sum or sums by them assured to be hereunder written at their office in London this day of in the year of the reign, &c. &c. A. D. 18

Free from all average on corn, flour, fruit, fish, salt, and seeds, except general.

Free from average on sugar, rum, hides, skins, hemp, flax, and tobacco, under £5 per cent.

And on all other goods and ship under £3 per cent. except general.

The said governor and company are content with this *assurance for*

The policy of the Royal Exchange Assurance Company is superscribed with the Name of the Company thus:

S. G. No. } S. G. No.
No. } L.

By the Corporation of the Royal Exchange Assurance: and is very similar to that of the London Assurance. The conclusion is:—And so the said corporation are contented and do hereby promise and bind themselves, and their successors, to the assured their executors, administrators, and assigns, for the performance of the premises confessing themselves paid the consideration due unto them for this assurance by

at and after the rate of

per cent. *In Witness* whereof, the said corporation have caused their common seal to be hereunto affixed, and the sum or sums by them assured to be hereunder written, at their office in the *Royal Exchange* of *London*, this day of in the year of the reign of our Sovereign Lord George the Fourth, by the grace, &c. &c. A. D.——

The said corporation are content with this assurance for

Free from all average on corn, flour, fish, salt, fruit, seed, hides, and tobacco, unless general, or otherwise specially agreed.

Free from average on sugar, rum, skins, hemp and flax, under £5 per cent., and on all other goods, and on ship under £3 *per cent.* except general.

By order of the court of directors.

PART II.

Policy of Insurance against fire.

By the corporation of the Royal Exchange Assurance

of houses and goods from fire.

This present instrument or policy of assurance witnesseth, That whereas A. B. hath agreed to pay into the treasury of the corporation of the Royal Exchange, *London*, for the assurance of from loss or damage by fire. Know all men by these presents, That the capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, his heirs, executors, or administrators, any loss or damage which shall or may happen by fire to the said goods aforesaid (except such goods as hemp, flax, tallow, pitch, tar, turpentine, glass, china, and earthen-wares, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, plate, pictures, gunpowder, hay, straw, and corn unthreshed,) within the space of twelve calendar months from the day of the date of this instrument or policy of assurance, not exceeding the sum of and shall so continue, remain, and be subject and liable as aforesaid, from

year to year, to be computed from the day of in every year, for so long time as the said assured shall well and truly pay, or cause to be paid, the sum of into the treasury of the said corporation, on or before the day of which shall be in each succeeding year, and the said corporation shall agree thereto by accepting and receiving the same; which said loss or damage shall be paid in money immediately after the same shall be settled and adjusted, or otherwise, if the said loss or damage shall not be adjusted, settled, and paid within sixty days after notice thereof shall be given to the said corporation, by the said assured, that then the said corporation, their officers, workmen, or assigns, shall, at the charge of the said corporation, at the end and expiration of the said sixty days, provide and supply the said assured with the like quantity of goods of the same sort and kind, and of equal value and goodness with those burnt or damnified by fire. *Provided always nevertheless*, and it is hereby declared to be the true intent and meaning of this deed or policy, That the said stock, estate, and securities of the said corporation shall not be subject or liable to pay or make good to the assured any loss or damage by fire, which shall happen by any invasion, foreign enemy, or any military or usurped power whatsoever. Provided also, That this deed or policy shall not take place or be binding to the said corporation until the premium for one year is paid, or in case the said assured shall have already made, or shall hereafter make any other assurance upon the goods aforesaid, unless the same shall be allowed of and specified upon the back of this policy; or if the said A. B. at the time when any such fire shall happen, shall be in the possession of, or let to any person who shall use or exercise therein the trade of a sugar-baker, apothecary, chymist, distiller, bread or biscuit-baker, ship or tallow-chandler, stable-keeper, innholder or malster, or shall be made use of for the stowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the said cases these presents, and every clause, article, and thing therein contained, shall cease, determine and be utterly void and of none effect, or otherwise shall remain in full force and virtue. In Witness whereof the said corporation have caused their common seal to be hereunto affixed, the day of in the year of the reign of our sovereign lord by the grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, &c. and in the year of our Lord one thousand eight hundred and

N. B. This policy to be of no force, if assigned, unless such assignment be allowed by an entry thereof in the books of the company.

Form of Policy of an Insurance against Fire by the Protector Fire Insurance Company.

Whereas ha paid the sum of to the directors of the "Protector Fire Insurance Company," and ha also agreed to pay the sum of yearly on the day of during the con-

tinuance of this policy, for insuring from loss or damage by fire the property hereby described, not exceeding the sum specified on each article, namely :—

Now, be it known, that we, whose hands and seals are hereunto subscribed and affixed, being three of the said directors, do covenant and agree with the said that from the day of and so long as the said insured shall pay, or cause to be paid, the sum of at the time above-mentioned, and the directors for the time being shall accept the same, the stock and funds of the same company shall be subject and liable to pay or make good to the said insured, executors, administrators or assigns, all such loss or damage as shall happen by fire, (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion or riot, or any military or usurped power whatever,) to the property above-mentioned, amounting in the whole to no more than the sum of according to the conditions endorsed on this policy.

In witness whereof we have hereunto set our hands and seals, this day of in the year of our Lord, one thousand eight hundred and

Signed, sealed, and delivered in presence of	A. B.
G. H.	C. D.
Examined, I. K.	E. F.
Entered, L. M.	

When the Protector Fire Office was instituted, the policy was laid before one of the most eminent common lawyers, and one equally eminent as a conveyancer, for the purpose of giving the public the best security upon this subject. See Ellis, p. 2. and see the case of *Alchorne* v. *Saville*, 6 Moore, 202, n.; *Andrews* v. *Ellison*, 6 ib. 199.

Endorsement of Policy of Insurance against Fire, on Removal of Property.

The property insured by this policy (or such of the property as is insured,) having been removed to the insured's dwelling-house, brick, timber, and tiled situate in in the county the same shall remain insured, in such house, and not as heretofore.

The same sums insured, and premiums as before.

Entered in the office books this day of

Transfer of Policy on Conveyance of Interest by Purchase or Gift.

I, A B, do hereby assign all my right and interest in this policy to C. D. of in the county of

Witness my hand this day of

Signed in the presence of and entered in the office books this day.

Memorandum to be endorsed on a Policy in case of an Addition.

Memorandum. It is hereby declared, that there is a stove erected in one of the sheds adjoining the herein described; the same is hereby allowed without prejudice to this insurance.

Entered day of

Average Clause in Policy of Insurance against Fire.

Provided always and it is hereby declared, that in case the property insured in this policy, in all the buildings, places, or limits above-mentioned, shall at the breaking out of any fire, or fires, be collectively of greater value than the sum insured thereon, the said company shall pay and make good to the insured such a proportion only of the loss or damage sustained as the amount insured shall bear to the whole property aforesaid at the time when such fire or fires shall first happen. But it is at the same time declared that if the said insured shall, at the time of any fire, be insured in this or any other office, on any specified parcel of goods, or on goods on any specified building or buildings, place or places, included in the terms of this insurance, this policy shall not extend to cover the same, except only as far as relates to any excess of value beyond the amount of such specified insurance or insurances, which excess is hereby declared to be under the protection of this policy, and subject to average as aforesaid.

Form of Averments in Declaration relative to the interest of the Plaintiffs, (*Commission Merchants—De Forest* v. *The Fulton F. Ins. Co.*, 1 Hall, 84.)

"And the said plaintiffs aver, that from the time of the making of the policy of insurance aforesaid, and the promise and undertaking aforesaid until and at the time of the loss hereinafter mentioned, the said plaintiffs were *possessed* of divers goods and merchandise, hazardous and not hazardous, *as well the property of the assured, as held by them in trust or on commission*, which were contained in the store and cellar, in the said policy of insurance mentioned, to a large amount, to wit, to the amount of all the several sums in and by the said policy, and the several policies hereinafter mentioned insured thereon, or so mentioned to be," &c.

"And the said plaintiffs aver, that after the making of the said policy of the defendants, and during the time therein insured," &c., "the said goods and merchandise, in the said policy of insurance of the defendants mentioned, were by misfortune, without fraud or evil practice on the part of the plaintiffs, burnt, damaged, consumed and lost by fire," &c. "and that by such fire *the plaintiffs sustained loss and damage*," &c. "to the amount of all the sums insured on said goods and merchandise.

The defendants pleaded the general issue.

By the terms of the policy, the defendants, insured De Forest and Son, against loss or damage by fire, to the amount of $10,000, on goods and merchandise, hazardous and not hazardous, *as well the property of the assured, as held by them in trust or on commission, contained in store No. 82 South Street, for the term of one year.* The court held that the words "goods held on commission" in fire policies, are eqivalent to the clause, "for whom it may concern"

usually inserted in marine policies. They contain a distinct declaration, that the assured were acting for the benefit of their consignors; and that other interests than their own, were to be protected by the policies.

Held also that in declaring upon such a policy, the declaration may set forth the facts as to the ownership according to the truth of the case, and conclude to the damage of the plaintiff, (the commission merchant.) Consequently, the latter was held to have an insurable interest in the goods held on commission, to their full value, without regard to their lien. It is to be observed, however, that where one of the conditions annexed to the policy, declares, that "goods held in trust or on commission," shall not be covered, unless they are insured as such. Held, that although the insured had a lien for advances upon articles not his property, his interest was not absolute but conditional; and it could not be covered by a mere insurance upon his own property. To be covered by the policy, they must be specified in it as goods held in trust or on commission. 2 Hall, 372.

(First Plea, non est factum; second plea, actio non.) Because they say, that the said stock of coals of the said plaintiff above-mentioned to have been insured as aforesaid, before and at the time of the making of the aforesaid policy, was described otherwise than it really was, to wit, at &c., *(venue)* aforesaid; and of this they the said Company put themselves upon the country, &c.

(Third form, actio non.) Because they say, that divers large quantities, to wit, 100 bushels of the said coals in the said declaration mentioned, to have been the stock and property of the said, &c. and to have been on the said open wharf adjoining west, mentioned in the said policy of assurance, and by the said declaration above mentioned, to have been burnt, consumed, lost, and destroyed by fire before and at the time of the making of the said policy of assurance, had taken fire, and were burning and consuming by fire, whereof the said plaintiff, before and at the time of the making of the said policy of assurance, to wit, on, &c. aforesaid, at, &c., *(venue)* aforesaid, had notice *(a)* and then and there, with intent to defraud the said defendants, fraudulently and deceitfully obtained and effected the said policy of assurance, in the said declaration mentioned; and this they the said defendants are ready to verify, wherefore, whose, &c.

(a) As policies on goods against fire are not like ship insurances "lost or not lost," so as to cover an existing loss, it should seem that if the coals were even latently on fire at the time the policy was effected, and this unknown to the insured, yet the policy would be void, and therefore an averment of notice and fraud is unnecessary, and not traversible. See also 3 Ch. Pl. 1010 *et seq.* for other forms of pleas to declarations on fire policies. See also Vol. 2, p. 193 for form of *Declaration* for loss of ship and goods burnt at sea.

We have seen (p. 60,) that a description of the subject of insurance, to amount to a warranty that the subject is such as the policy describes it to be, must appear on the face of the policy. And when the written and printed parts of the policy come into conflict, the written clauses, as expressing the special agreement and declared intention of the parties at the time of the contract, must prevail, and the printed parts be held subordinate—(see ante p. 61.)

Where it was stated in the policy, that it was effected on goods in the building—*more particularly described in the application and survey furnished by himself, filed No.* 928, *in the office of the insurance company*; and the insured also at the time of effecting the insurance, presented a *survey*, which stated that the building in which the goods were, was divided by a *stone partition running lengthwise through the building to the roof:* Held, that this was only a *representation*, and not a *warranty*; and consequently, the variance between the survey and the proof was held not to be material. *Snyder* v. *The Farmers' Ins. and Loan Co.*, 13 Wend. 92. To make a separate paper a part of the policy, there must be an *express stipulation* in the policy to that effect.

The contract of insurance like other contracts, for the benefit of a third person, without his knowledge or authority, is a binding contract on the promisor, and may be enforced by him for whose benefit it was made. 1 J. R. 139; 3 B. & P. 149, n.; 17 Mass. 400; 1 Hall, 260. And even a conditional ratification is binding, where the contingency on which the plaintiff was instructed to consider the policy effectual, actually happened. The intention of the insured to cancel the policy in certain events, which did not happen, cannot, I think, be construed a fraud on the defendants, so far as to release them from their contract, when they had fairly assumed the risk, and had received the premium for it.

Form of Declaration on a Policy against fire. (Lownsbury v. Protection Ins. Co. 8 Conn. R. 459; see *ante* p. 461, *et seq.*)

In a plea, &c. for that the defendants, being an incorporated Company, duly incorporated by the Legislature of the State of , and empowered by their charter (set forth the general powers of the Company under their charter,) by their policy under the hands of the President and Secretary thereof, duly executed according to said charter, for a certain premium paid by the plaintiff, made insurance upon the buildings, &c. of the plaintiff, viz: a building occupied by the plaintiff *as a manufactory of hat bodies, and on the privilege for all the process of said business.* (Here recite the provisions of the policy and also the articles annexed as "conditions.") And the plaintiff avers, that on the day of said first described wooden building, occupied as a manufactory, and the machinery therein, being the property of the plaintiff, were, accidentally and without the fault of the plaintiff, burned up and entirely consumed by fire, and were thereby wholly lost to the plaintiff. (Here state the value of the property destroyed.) The plaintiff, forthwith, viz: on the day of , gave notice thereof to the said company; and on the same day aforesaid, and as soon after as possible, delivered in to said Company a particular account of the loss or damage by him sustained, by the destruction of said building, machinery and other property, signed with his hand, and verified by his oath in due form, administered by Benjamin Isaacs, Esquire, justice of the peace in and for the county of Fairfield; and on the said day of the plaintiff declared on oath duly administered, by said justice Isaacs, that no other insurance had been made on the property destroyed as aforesaid, and procured a certificate, under the hand of said Isaacs, as such justice of the peace, he being most contiguous to the place where said property was destroyed as aforesaid, that he was acquainted with the character and circumstances of the plaintiff, and that he verily believed, that he really and by misfortune, and without fraud or evil practice, had sustained, by such fire, the loss or damage to the amount mentioned in his account thereof as aforesaid, &c.*

To the President, Directors & Co. of the Columbian Insurance Company of Alexandria. (2 Pet. R.)

Gentlemen:—We regret that we have now to inform you of the total destruction of our mill by fire, on the night of the 14th inst., which was insured in your office, the particulars of which we will forward you as soon as we can prepare the necessary documents as laid down in the conditions accompanying the policy.

(Date.) LAWRENCE & POINDEXTER.

(*Annexed was the following affidavit.*) We hereby certify, that by the burning of our mill, situate on an island in the county of Stafford, about one mile from

* Exceptions were taken to the declaration, because it did not negative the conditions in the policy inserted by way of proviso; but the court held, that it was unnecessary. They are introduced into the policy for the benefit of the defendants; and they must be taken advantage of, if at all, by pleading. See the judgment of the court, *ante*, p. 161 *et seq.*

the town of Fredericksburg, and state of Virginia, called the Elba mill, four stories high, the walls of stone and covered with wood, on which seven thousand dollars were insured by us in the office of the Columbian Insurance Company of Alexandria, on the 9th day of April last, per policy No. 279, and which was destroyed by fire on the night of Saturday last, the 14th inst., we lost, or were damaged at least twelve thousand dollars, exclusive of the contents of said mill. We are entirely ignorant of the circumstances which occasioned the fire, and we further certify that we have no other insurance, directly or indirectly on theaforesaid property, except the above mentioned.

JOSEPH W. LAWRENCE, THOS. POINDEXTER, JUN.

Commonwealth of Virginia, Stafford County, Feb. 16, 1824, to wit: Joseph W. Lawrence and Thomas Poindexter this day personally appeared before me, a justice of the peace for the said county, and made oath, in due form, that the above certificate contains the truth to the best of their knowledge and belief.

MURRAY FORBES.

(*The following affidavit was also annexed.*) I, Thomas Seddon, of the town of Fredericksburg, in the county of Spottsylvania, and state of Virginia, do certify, that I am well acquainted with the mill called and known by the name of the Elba mill, owned and occupied by Joseph W. Lawrence and Thomas Poindexter, situate on an island in the county of Stafford, about one mile from the town of Fredericksburg; that the said mill was built of stone four stories high, and covered with wood; that between ten and eleven o'clock on Saturday night, the 14th inst., I was alarmed by the cry of fire, which I soon ascertained to be the mill aforesaid; that I have since viewed the ruins, and am of opinion that it would require at least ten thousand dollars to rebuild the same, and restore the proprietors in the situation they were in previous to the said fire; that I have no knowledge or idea how the fire originated.

THOMAS SEDDON.

Commonwealth of Virginia, Stafford County, to wit: Thomas Seddon this day personally appeared before me, one of the Commonwealth's justices of the peace of the county aforesaid, and made oath to the truth of the foregoing certificate signed by his hand. MURRAY FORBES.

Statement of Loss.

I, A. B. the person insured in Policy No. underwritten by the New York Equitable Fire Insurance Company, on this day of do state, that in consequence of the fire, which happened on the day of I have sustained loss of stock to the amount of $5000, viz: $3000, for goods consumed in the store named in the said policy;—$1000, for goods which were injured in the removal;—and $1000, for goods which were abstracted by the crowd assembled on the occasion, and have never been recovered. The goods so abstracted and lost, consisted of four post bedsteads, mahogany tables of various sizes, couches, chairs, chimney glasses, pier glasses, carpets, and the like. And I further state that I have no other insurance directly or indirectly on the aforesaid property. A. B.

New York City, Jan. 1, 1840, personally appeared before me one of the judges of the New York City County Court, the aforesaid A. B. and made oath to the truth of the aforesaid statement.

Form of Certificate of a Magistrate, Notary Public, or Clergyman.

This may certify, that I, Joel Parker a Clergyman, and ministering at the Tabernacle in Broadway in the City of New York, most contiguous to the place of fire, and not concerned in the loss, nor related to the insured or sufferers, by the fire which happened to the building belonging to the New York Library Association, situated in said Broadway, being No. —, on the morning of the 19th of January current, which consumed and damaged the interior of the said building;—that I am acquainted with the character and circumstances of the persons insured; and having investigated the circumstances in relation to such loss, do know or verily believe, they, really and by misfortune, and without fraud or evil practice, have sustained loss and damage by said fire to the amount stated in their account of loss and damage.

In Witness whereof I have set my hand in the City of New York, this 19th day of January, 1840.

JOEL PARKER.*

Notice by the insured to the insurers.

"The Rensselaer and Saratoga Insurance Company, having insured property of D. C. Norton &c. to the amount of two thousand dollars, by a policy signed the 24th day of October, 1825, notice is, therefore, hereby given to said Insurance Company, that the insured sustained a loss by fire on the property insured, on the morning of the 28th day of February, 1826, to the amount of at least five thousand dollars. The following is all the account the insured have it in their power to give of the accident and loss, viz: David C. Norton, one of the firm insured, closed the store a few minutes after nine o'clock on Monday evening, the 27th of February last past, leaving in the store, besides the goods insured, all the books of account, the notes, excepting one or two which were in his pocket book, the bills of goods, the cash book, and also about two hundred dollars in money, which was intended to be used to pay up a bank note coming due on or about the 1st of March, 1826. At this time every thing appeared perfectly safe in the store. Nelson Agan, one of the firm, was absent in the country, leaving in the store all his clothing, and which

* The rule is not so strict as to require the certificate to be in the very words mentioned in the policy, provided it be so drawn as to mean the same thing. See *ante* p. 110, 111. Where the condition in the policy required the production of a magistrate's certificate, that he is acquainted with the character and circumstances of the assured, and that having investigated the circumstances in regard to such loss, knows or verily believes that the assured really, and by misfortune and without fraud or evil practice, has sustained by such fire, loss or damage to the amount therein mentioned. Held, that a certificate of the magistrate, "that he resided within two miles of the assured, and that he was acquainted," which amounted substantially to the same thing, was sufficient. 16 Wend. 385.

was burnt. The insured cannot say, nor can they conjecture how or where the fire originated. The store containing the goods insured, were burnt, and all the goods therein, papers, books, &c., as above stated, were entirely destroyed, except a remnant sold for twenty dollars. The fire was discovered about one o'clock at night, at which time the insured, Norton, was at his father in law's with his wife, a distance of about a mile from the store. Agan, as above stated, was in the country, and no one was sleeping in the store. Something like a week before the fire, the insured were looking over their bills of goods bought, their cash book, and also their books of accounts, and ascertained that they had then on hand goods to the value of rising of five thousand dollars. This amount had not been much reduced by sales previous to the fire. Given under our hands at Lansingburgh the first day of March, 1826.

DAVID C. NORTON,
NELSON AGAN."

"Rensselaer County, ss. David C. Norton and Nelson Agan, being duly sworn, say, and first the said David C. saith that the statement of facts and circumstances within contained, respecting the fire and loss within mentioned, are true. And the said Nelson Agan saith, that the facts and circumstances as aforesaid, so far as they relate to his own knowledge are true, and so far as the same are derived from the knowledge and information of others, this deponent believes to be true.

DAVID C. NORTON,
NELSON AGAN."

Sworn before me this first day of March, 1826,
one of the judges of the Rensselaer county court.

Second Notice in the same case, dated the 11th of April, 1826.

"Black, blue, mixed, olive and drab broadcloths, $800, Cassimeres, $115, Lion Skins, $25, Domestic cloths," &c. (stating the particulars.) Sum total, $5204.

"Rensselaer County, ss. David C. Norton, one of the firm of Norton and Agan, being duly sworn, saith, that, in pursuance of a request from the *Rensselaer and Saratoga Insurance Company,* to furnish them with a statement of the goods lost by fire, in addition to the statement heretofore made to said company, on the 2d day of March, 1826, he has made the annexed statement. That the same is made from recollection, without having papers to refer to, but is, in all respects, correct, according to the recollection and belief of this deponent.

DAVID C. NORTON.

Sworn before me this 11th day of April, 1826,
one of the judges of the Rensselaer county court. *

* The latter forms are selected from the case of Norton v. the R. & S. Ins. Co., 7 Cowen, 645, where they were approved by the Court. The Court, by Savage, C. J. say: "The only question is, whether the notice of the 2d of March was a compliance with the 10th proposal in the policy. That proposal is brought over from the English policies, where it is held to be a condition precedent; and the clause connected with it, which relates to the certificate of third persons, has been the subject of several decisions confining the plaintiff with great strictness to the

persons named. (2 Condy's Marsh, 808 to 813, and the cases there cited.) I am not aware of any case which goes into the form of the notice, and the affidavit of the party. Undoubtedly these must be furnished, according to the policy, a certain number of days before an action can be brought: but it is another question what they should contain. The clause requiring proof of loss in marine policies, has been construed with considerable liberality. The court have looked to circumstances; and required no more information of the party than what appeared to be within his control. In Lawrence v. the Ocean Ins. Co., (11 Johns. 260,) Thompson, J. in delivering the opinion of the court, says the clause "requires only reasonable information to be given to the underwriters; so that they can be enabled to form some estimate of their rights and duties, before they are obliged to pay. This clause has always been liberally expounded; and is construed to require only the best evidence of the fact which the party possesses at the time. Such has been the uniform construction put upon it by this court. (2 John. Rep. 317.") The clause itself in the policy before us, expressly contemplates the latitude arising from circumstances. The account of the loss or damage is to be as particular as the nature of the case will admit of: and we think, after the total destruction of those papers which alone could furnish accurate details, the notice of the 2d of March was sufficient.

Good faith, and the true spirit and intention of the clause requiring a survey of the ship, requires also the production of this document as preliminary proof touching the nature and extent of the loss. Hoff v. the Marine Ins. Co., 4 John. 132. In such case, the underwriters do not stipulate to become answerable for any loss which may happen by reason of unsoundness or rottenness, and the survey is the document by which that is to be ascertained. If the survey show that the vessel was unable to prosecute her voyage on account of being unsound or rotten, it is sufficient,at least *prima facie* to exonerate the underwriters.

In Johnson v. The Columbian Ins. Co., 7 J. R. 315, the proofs were a protest at the destined port, an invoice of the cargo belonging to the plaintiff, who was master of the vessel, together with the original bills of parcels of the goods mentioned in the invoice; a survey of the goods also at the destined port, and an authenticated account of the sales at auction of the goods described in the invoice, which were damaged 25 per cent., and were sold by order of the authority at that port.

In Lounsbury v. Protection Ins. Co., *supra*, an exeeption to the declaration was taken, because it contained no averment, that the Justice before whom the plaintiff's oath to the amount of the loss of property, was not concerned in the loss, nor related to the party; and therefore, for aught that appeared, he was incompetent to take the affidavit. In reply to this objection, the court say—"Whoever supposed before, that such an allegation was necessary? It is never necessary, in pleading, to negative the exception, which may exist against a Judge or Justice."

The allegation in the declaration was "That no other insurance had been made on the property destroyed as aforesaid;"—whereas the condition of the policy was, that the insured should declare on oath, "whether any, and what other insurance has been made on the same property." It was objected that there was a variance; but the court said that the objection was hypercritical. *ib.*

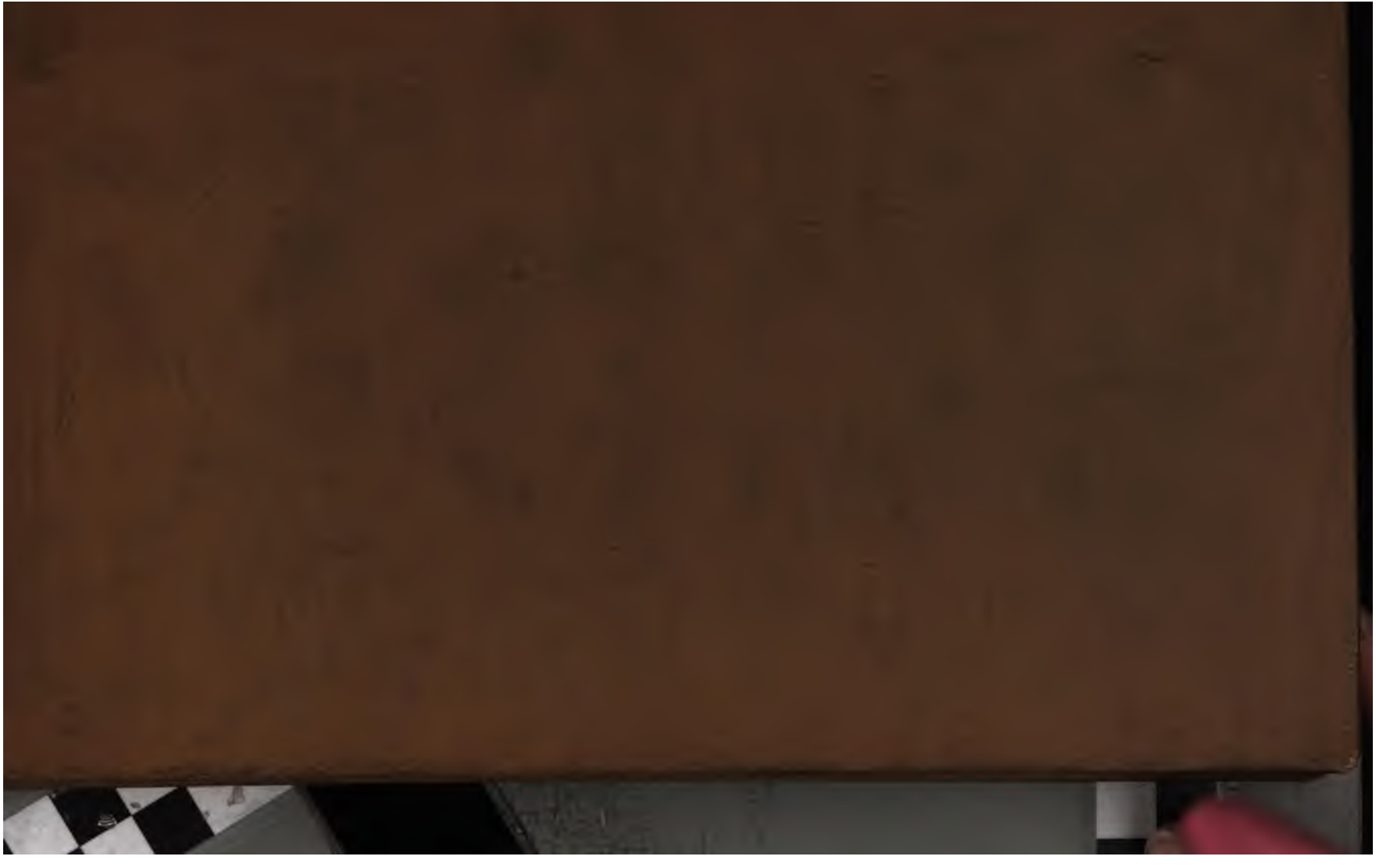
What preliminary proofs are made necessary by the conditions of the policies, have been considered, *ante* p. 105 to 111. It may be observed in reference to a marine policy, that the insured *must* state sufficient reasons for his offer to abandon; if he states an insufficient reason, he cannot, at the trial, rely upon one not

stated in the notice. King v. The Delaware Ins. Co. 3 Wash. C. R. 300. The protest of the master is the usual evidence of the loss; but where the master was a prisoner, the pilot gave notice of the capture, not under oath, and held sufficient. 4 Mass. 88.

The conditions of the policy must be complied with. A fire without fraud is not enough to give the assured a right of action;—it must be a fire accompanied with the *notice, particular account of the loss, affidavits and certificate* specified in the proposals and conditions annexed to the policy.

The insured should look into the conditions of his policy for direction in regard to his preliminary proofs; and by reading therein he will understand what he must do *forthwith*, directly, without delay; and if he neglects, he cannot recover. The insured *must forthwith give notice thereof, &c.*, and as *soon after as possible*, they shall deliver as *particular account as possible of their loss and damage as the nature of the case will admit, &c.* Such account must be *signed* and verified with their *oath* or *affirmation*, and also, if required by their *books of account* and *other proper vouchers*. The *particular account* required, means "an account of the loss, that is, of the thing or value lost; or of the damage, that is, of the amount of the injury sustained." And lastly they must *declare on oath whether any and what other insurance has been effected* on the property. In doing these, there must be neither *fraud* nor *false swearing*.

On the other hand, as has been remarked p. 111, the underwriters should apprise the insured that the proofs are defective, so as to give him an opportunity to supply the defect, before it is too late. If they neglect to do so, their silence shall be considered as a waiver of the defect in the proofs.

However, the preliminary proofs can only be dispensed with by a board of directors of the company, or a committee authorised to settle the claim. The president has no power to dispense with the terms of the contract. Dawes v. N. R. Ins. Co., 7 Cowen, 462. By the act of incorporation, the president was not clothed with any power to settle or pay claims, without one third of the directors; nor to do any other act, except signing policies. But see 16 Wend. 385, and *ante* p. 111.

The payment of money into Court by an agent of the company is an admission of a cause of action as alledged in the declaration. 7 John. 315.